

(24,282)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 538.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

SAM E. LESLIE, ADMINISTRATOR OF THE ESTATE OF
LESLIE OLD, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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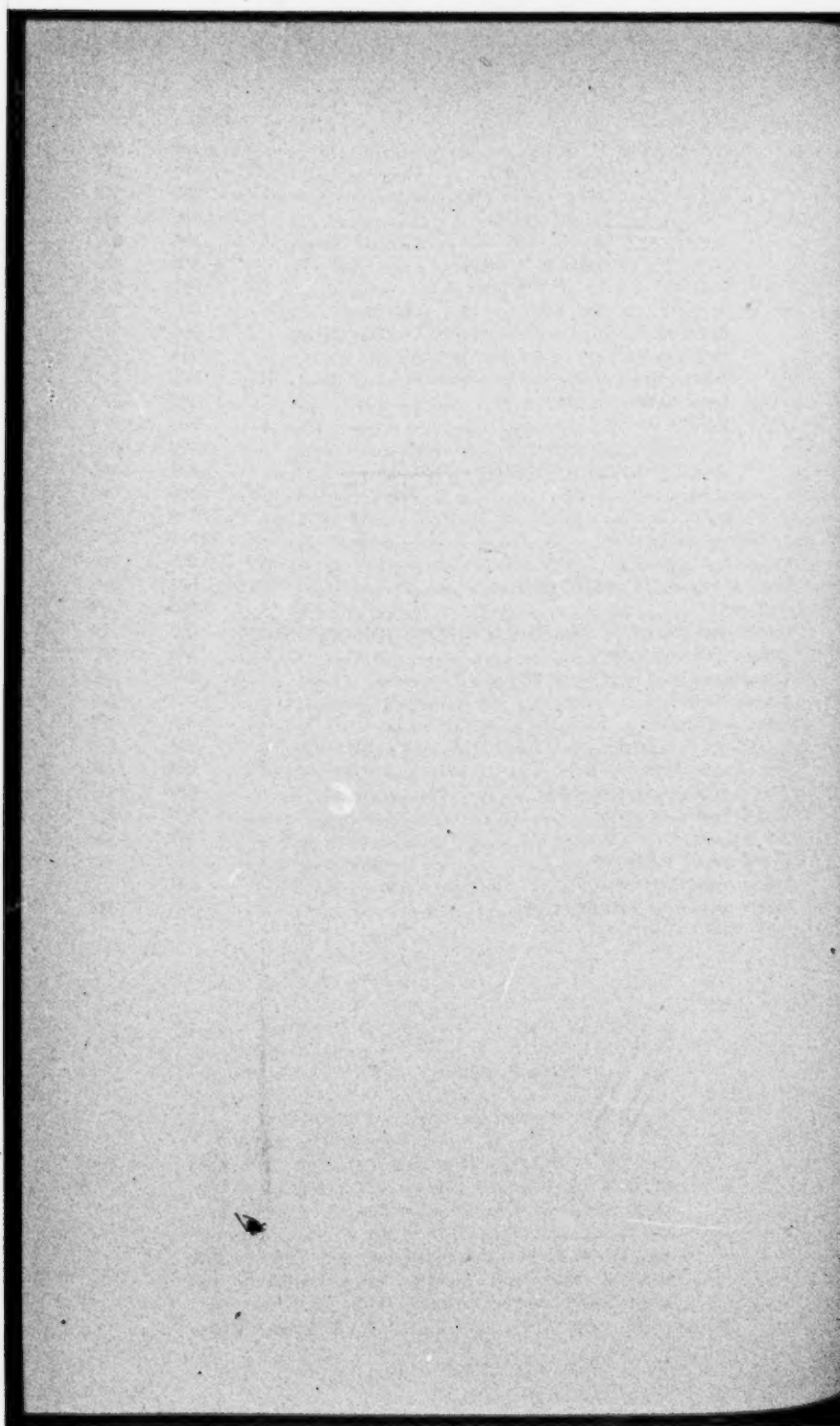
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1

Caption.

In the Little River Circuit Court.

SAM E. LESLIE, Administrator of Estate of L. A. Old, Deceased,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY.

Pleas Before the Honorable Jefferson T. Cowling, Judge of the 9th
Judicial Circuit of Arkansas, and a Jury, on the 11th Day of
July, 1913.

Action for Personal Injury.

2 In the Little River County Circuit Court, July Term, 1913.

SAM E. LESLIE, as Administrator of the Estate of Leslie A. Old,
Deceased, for the Benefit of Deceased's Wife, Annie May Old, and
Her Infant Child, William J. Old, Jr., Plaintiff,

vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Complaint at Law.

Now comes the plaintiff, Sam E. Leslie, as administrator of the
estate of Leslie A. Old, deceased, who sues for the benefit of deceased's
wife, Annie May Old, and her infant child, William J. Old, Jr.
and for his cause of action herein alleges:

That plaintiff's deceased departed this life on or about the 26th
day of March, 1913, leaving him surviving as the sole beneficiaries
and heirs at law his widow, Annie May Old, who at the time of de-
ceased's death was twenty-two years old, and his infant child William
J. Old, Jr., about three months old.

That at the time of his death, Plaintiff's deceased was a resident
of Howard County, Arkansas, and had been all his life; that on or
about the 21st day of May, 1913, the plaintiff, Sam E. Leslie was by
the Probate Court of Howard County, Arkansas, appointed

3 administrator of deceased's estate and that he has duly qual-
ified and is now acting as such administrator and a copy of his
letters of administration is hereto attached, marked exhibit "A", and
asks to be made a part of this complaint.

Plaintiff further alleges that on and prior to the 26th day of
March, 1913, and ever since that time, the defendant was a railway
corporation and then owned and operated and still owns and operates
a line of inter-state railway, being a highway of Interstate Commerce,
extending from Port Arthur in the State of Texas, through the
States of Texas, Louisiana, Arkansas, Oklahoma and Kansas to
Kansas City, Missouri, and was then and there a common carrier of
passengers and freight for hire and was then engaged in inter-
state commerce, hauling inter-state shipments and cars over its rail-

roads on the said 26th day of March, 1913, and that plaintiff's deceased, Leslie A. Old was on said day and at the time of his injuries and death hereinafter complained of, in the employment of the defendant company as its middle or swing brakeman on one of its through freight trains, which was then and there being operated between the cities of De Queen in the State of Arkansas, and Heavener in the State of Oklahoma and that he was then and there employed by the said defendant company in interstate commerce and was actually engaged at the time of his injuries in such interstate commerce.

That the deceased in the discharge of his duty as such brakeman as aforesaid, was called upon the 26th day of March, 1913, to serve as swing or middle brakeman on one of the defendant's through freight trains from De Queen, Arkansas, to Heavener, Oklahoma; that he was called for duty only a short time before said trains left

De Queen; that he was an inexperienced brakeman and was
4 unfamiliar with the cars and the equipments of the cars composing said train upon which he was to work.

That said train was composed of about 55 cars of various heights, some being box cars, some gravel cars and some oil cars, all of which were placed irregularly and indiscriminately in the makeup of said train.

That the deceased being a middle or swing brakeman on said train, his duty as said brakeman required him to look after and pass over the tops of the cars composing the middle section of said train and that his beat or section of said train was composed of about 17 cars located in the center of said train; that at the rear end of deceased's section or beat on said train, there were two box cars or refrigerator cars of about equal height and that in immediately in front of these two cars there was a car usually denominated an oil car which contained a large, round iron tank placed upon a flat car and along the side of this iron tank and near the center of its height, there was constructed a narrow walk way or platform over and upon which brakemen were required to pass in going over and across said oil car.

That this platform or walk way along the side of the oil tank was some 6 or 7 feet lower than the top of the box or refrigerator car immediately behind it.

That there were no ladders or grab irons or hand holds on the end of the box or refrigerator car immediately behind the oil car to enable the brakeman to safely get from the top of said box or refrigerator car onto the platform or run way on the oil car immediately in front of it, or any other means or appliances provided to enable brakemen to safely get from the top of said box or refrigerator car onto the platform of said oil car except a ladder or grab iron or

hand holds down the side of said refrigerator car and about
5 two feet from the end thereof. That the absence of these grab irons or hand holds down the end of the box or refrigerator car, made it unnecessarily hazardous for brakemen to pass from the top of said box car or refrigerator car to the platform or walk way on the oil car immediately in front of it, all of which was known to the defendant company, or by the exercise of ordinary care

could have been so known notwithstanding it further knew that in the discharge of their duty its said brakemen were required to pass from the top of this box or refrigerator car onto the platform or walk way of the oil car.

That on the date aforesaid, just before defendant's train upon which plaintiff's deceased was working as aforesaid, reached the station of Page just over the line in the State of Oklahoma, the air on said train failed to work properly and because thereof, said train could not be handled or controlled properly or evenly, and when said train reached said station of Page, it was stopped in order to get orders controlling its future movements or for some other reason, unknown to the plaintiff, and the deceased and the conductor of said train to wit: one Harry Eames alighted from said train and went into defendant's station house at said point and after transacting such business or discharging such duties as they were required to discharge, said train was ordered to proceed on to Heavener, when deceased got on top of said train on the rear car of his beat or section, which was a box or refrigerator car and proceeded towards the front end of his beat or section which necessarily carried him over the box or refrigerator car immediately in the rear of the oil car heretofore referred to.

That the markings and numbers of said cars are unknown
6 to the plaintiff and for that reason he cannot more particularly describe them.

That when said train began to move out of the station of Page, because of the defective condition of the air as aforesaid said train began jerking and swaying violently and so continued until plaintiff was injured.

That in attempting to pass from the top of the box or refrigerator car to the platform or walk way of the oil car immediately in front thereof, in the discharge of his duty as such brakeman, and while said train was jerking violently as aforesaid and because of the absence of hand holds or grab irons down the end of said box or refrigerator car, which would have enabled the brakeman to hold the same and thereby safely pass from the top of said box car or refrigerator car to the platform of the oil car the said deceased was either — from said car or fell between the ends of the box car or refrigerator car and the oil car immediately in front thereof, and was run over by defendant's said train and was so badly mangled and injured that he died from the effects of said injury within about three hours thereafter.

That in passing over the body of plaintiff's deceased, the wheels of said train cut off both his legs below the knees and tore a great hole in his body just under his shoulder blade and crushed the back of his skull, and that from said injuries deceased died in about three hours and that he was conscious from the time of his injury up until a few moments before his death.

That the train upon which deceased was working at the time of his injury as aforesaid, was made up at De Queen and that at that point, the defendant on the day of injury and prior thereto was maintain-

7 ing and had maintained an inspector whose duty it was to make careful and close inspection of all cars composing its trains before they were permitted to leave said station and to see that they were properly equipped with such safety appliances as would enable the crew of said train to discharge their duties without unnecessary hazards, and if in making such inspection, said inspector discovered any cars not so equipped or out of order, it was his duty to cut said cars out of said train, and plaintiff's deceased under the law had a right to and did rely upon the defendant's inspector properly performing his duty with reference to said train and that he had a right to and did assume that the cars placed in said train where he was called to work, had been properly inspected and had been found to be equipped with proper and safe equipment such as handholds, ladders or grab irons down the ends of said cars, which would enable him to safely pass from one car to another without exposing himself to any unnecessary danger.

Plaintiff further alleges that it was the duty of the defendant company to have the ends of its cars or the ends of the cars which it permitted its trains to haul, to be equipped with sufficient handholds or grab irons, on the ends of said cars as would enable the brakemen to safely go from one car to another in the discharge of his duties, without exposing himself to unnecessary hazards and dangers.

He further alleges that it is usual and customary among well regulated railroads operated by reasonably prudent persons to equip its cars with such handholds or grab irons on the ends of such cars as would enable its brakemen in the discharge of their duty to safely go from one car to another without incurring any extra or unnecessary hazard or danger, and he further alleges that the defendant was negligent in the operation of its train herein-

8 before complained of, at the time of deceased's injury in this: That it failed to exercise ordinary care in having the cars composing said train so equipped with handholds or grab irons on the ends of said cars, as to enable brakemen to in the discharge of their duty, safely pass from one car to another.

That it was further negligent in making up said train, it carelessly and negligently placed the oil car next to the box car or refrigerator car knowing that the platform or walk way on said oil car was some six or seven feet lower, than the top of the box or refrigerator car, without providing any means or appliances which would enable the brakemen to get from the top of said box or refrigerator car on to the platform or walk way of said oil car, when it knew or by the exercise of ordinary care could have known that in placing this box car or refrigerator car equipped with handholds or grab irons down the ends of said car next to the oil car, it would increase the danger to the brakemen in passing from the top of said box or refrigerator car to the platform of said oil car.

Plaintiff alleges that the defendant was further negligent in permitting to go into its train and to be hauled therein, any car which was not furnished with such hand holds or grab irons on the end thereof, as would enable its brakemen to safely go from car

to car; that the acts of negligence herein complained of were unknown to plaintiff's deceased until long after said train had left the station of De Queen and that by reason of his inexperience as a brakeman, he was unable to and did not appreciate the dangers arising from said acts of negligence; that had the defendant equipped its cars with handholds or grab irons at the ends thereof, or had it placed in the making up of said train a car so equipped next to the oil car, plaintiff's — could have and would have

9 gone from the top of said box or refrigerator car on to the platform of said oil car in safety, but that by reason of the absence of such hand holds or grab irons, on the end of said box or refrigerator car, or some other proper appliance which would have enabled deceased to safely go from the top of said box car to the platform of said oil car, concurring with the unusual and violent jerking of the defendant's train as it passed out of the station of Page, the deceased was unable to safely go from the top of said car to the platform or walkway on the oil car while in the discharge of his duty, and in his effort to do so, and while in the exercise of due care himself, he was thrown between the ends of the cars or fell between the ends of said cars, and injured as hereinbefore stated, and that his said injuries *was* the direct result of the acts of negligence of the defendant as hereinbefore stated.

That the deceased at the time of his death was 24 years old and was earning \$100 per month with a fair chance for an increase in his wages and had a life expectancy of 39 years: that he was stout, healthy and active and that he contributed all of his earnings except about \$15 or \$20 per month, which he used for his personal expenses, to the support, maintenance and comfort of his wife and child.

That he lived about three hours after the injuries aforesaid, and during the said time he suffered great and excruciating mental and physical pain and agony to his damage in the sum of \$10,000.00. That by reason of the loss of support, maintenance and comfort which deceased would have contributed to his wife and child had he lived, they have been damaged in the sum of \$15,000.

10 Wherefore premises considered, plaintiff prays judgment against the said defendant for the benefit of deceased's widow and child as above named for the full sum of \$25,000.00, and for all other proper relief and will ever pray.

W. P. FEAZEL,
Attorney for Plaintiff.

"Summons issued May 23, 1913: Served May 23, 1913."

11 In the Little River County Circuit Court, July Term, 1913.

SAM E. LESLIE, as Administrator of the Estate of Leslie A. Old, Deceased, for the Benefit of Deceased's Wife, Annie May Old, and Her Infant Child, Wm. J. Old, Jr., Plaintiff,

VS.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Complaint at Law.

Now comes the plaintiff, Sam E. Leslie as Administrator of the estate of Leslie A. Old, deceased, who sues for the benefit of deceased's wife, Annie May Old, and her infant child, William J. Old, Jr., and for his cause of action herein alleges:

That plaintiff's deceased departed this life on or about the 24th day of March, 1913, leaving him surviving as the sole beneficiaries and heirs at law, his widow, Annie May Old, who at the time of deceased's death was 22 years old, and his infant child, William J. Old, Jr., about three months old.

That at the time of his death, plaintiff's deceased was a resident of Howard County, Arkansas, and had been all his life; that on or about the 21st day of May, 1913, the plaintiff, Sam E. Leslie, was by the Probate Court of Howard County, Arkansas, appointed administrator of deceased's estate, and that he has duly qualified and is now acting as such administrator and a copy of his letters
12 of administration is hereto attached, marked exhibit "A" and asks to be made a part of this complaint.

Plaintiff further alleges that on and prior to the 24th day of March, 1913, and ever since that time, the defendant was a railway corporation and then and owned and operated and still owns and operates a line of inter-state railway being a highway of inter-state commerce, extending from Port Arthur in the State of Texas, through the States of Texas, Louisiana, Arkansas, Oklahoma and Kansas City, Missouri, and was then and there a common carrier of passengers and freight for hire and was then engaged in inter-state commerce, hauling interstate shipments and cars over its railroads on the said 24th day of March, 1913, and that plaintiff's deceased, Leslie A. Old, was on said day and at the time of his injuries and death hereinafter complained of, in the employment of the defendant company as its middle or swing brakeman on one of its through freight trains which was then and there being operated between the cities of De Queen in the State of Arkansas, and Heavener in the State of Oklahoma, and that he was then and there employed by the said defendant company in inter-state commerce and was actually engaged at the time of his injuries in such inter-state commerce.

That the deceased, in the discharge of his duty as such brakeman as aforesaid, was called on the 24th day of March, 1913, to serve as swing or middle brakeman on one of defendant's through freight trains from De Queen, Arkansas, to Heavener, Oklahoma; that he was an inexperienced brakeman and was unfamiliar with the cars

and the equipments of the cars composing said train upon which he was to work; that said train was composed of 51 cars of various heights, some being box cars, some oil cars or tank cars, some coal cars, all of which were placed irregularly and indiscriminately in the make up of said train.

That the deceased being a middle or swing brakeman, on said train, his work required him to look after and pass over the tops of the cars composing the middle section of said train and that his beat or section of said train was composed of about 17 cars located in or near the center of said train. That at or near the rear end of deceased's section or beat on said train, there were two box cars or refrigerator cars of height, marked with the initials "SFRD Refrigerator Car" of about equal height and that immediately in front of these two cars there was an oil car or tank car, usually denominated an oil car, which contained a large round iron tank, placed upon the floor of a flat car, with a railing about three feet high around the sides of said oil or tank car and the space of the floor between this side railing and the tank, constituted the only walk way or passage way provided for brakemen to pass over said oil or tank car, and this floor was seven or eight feet lower than the run-way on the top of the refrigerator car immediately in its rear; that there were no ladders or grab irons or hand holds on the end of the box or refrigerator car, immediately behind the oil car to enable or assist the brakeman to safely get from the top of the box or refrigerator cars onto the platform or run-way of the oil car immediately in front of it or any other means or appliances whatever provided by said defendant company to enable its brakemen to safely get from the top of said box car or refrigerator car onto the platform or floor of said oil car or tank car,

except a ladder or grab iron down the side of the said refrigerator car some distance from the end thereof, which made it necessarily dangerous for the brakemen in going from the refrigerator car to the tank car. That the absence of these grab irons or hand holds or ladders down the end of the box or refrigerator car, made it unnecessarily hazardous for the brakemen to pass from the top of said box or refrigerator car to said platform or walk-way on the oil car immediately in front of it all of which was known to the defendant company or by the exercise of ordinary care could have been so known to it.

Plaintiff further alleges that there were no grab irons or hand holds on the end of the oil car or tank car immediately in front of the refrigerator car, or any other appliances thereon, to enable brakemen in passing from the rear car to the oil or tank car to hold to and steady himself while making said passage.

That on the date aforesaid, just before defendant's train upon which plaintiff's deceased was working as aforesaid, reached the station of Page, just over the line in the State of Oklahoma, the air in said train failed to work properly, and because thereof said train could not be handled or controlled properly, or evenly and when said train reached said station of Page, it was stopped in order to get orders controlling its future movements, and the deceased and the conductor of said train, one Harry Eames, alighted from said train

and went into defendant's station house or waiting room at said point and after transacting such duties as they were required to discharge, said train was ordered to proceed on to Heavener and thereupon the deceased got on top of said train on the front end of the second car in the rear of the oil or tank car above described, which was one of the refrigerator cars, marked with the initials aforesaid, and

15 proceeded towards the front end of his beat or section, which carried him over the refrigerator car, immediately in the rear of the oil car heretofore referred to.

That when said train began to move out of the station of Page, because of the defective condition of the air as aforesaid, or from the negligence of the engineer in manipulating the air, of said train, or from some other reason unknown to plaintiff, said train began jerking and swaying violently and unusually, and so continued until plaintiff was injured.

That in attempting to pass from the top of the box or refrigerator car onto the oil car, immediately in front thereof, in the discharge of his duty as such brakeman, and when said train was jerking violently as aforesaid, and because of the absence of ladders or hand holds or grab irons down the end of said box or refrigerator car, which would have enabled the deceased to hold and thereby safely pass from the top of said box or refrigerator car onto the oil car, the said deceased was either thrown from said car or fell between the ends of the box car or refrigerator car and the oil car, immediately in front thereof, and because of the absence of any ladder, hand holds or railing on the end of said oil car or tank car, which would have enabled deceased to hold to while making such passage, said deceased was run over by defendant's train and was so badly mangled and injured that he died from the effects of said injury, within about three hours thereafter.

That in passing over the body of plaintiff's deceased, the

16 wheels of said train cut off both his legs below the knees and tore a hole in his body just below the shoulder blade and crushed his left shoulder and so injured the back of his skull that from the effects of said injury, deceased died as aforesaid, but that he was conscious from the time of his said injury up until a few moments before he died, during all of which time he suffered great physical and mental pain.

That the train upon which deceased was working at the time of his injury aforesaid, was made up at De Queen, Arkansas, and that at that point, the defendant on the day of the injury and prior thereto, was maintaining and had maintained an inspector whose duty it was to make careful and close inspection of all cars composing its trains before they were permitted to leave said station and to see that they were properly equipped with such safety appliances as would enable the crew of said train to discharge their duty without unnecessary hazards and if in making such inspection said inspector discovered any cars not so equipped, it was his duty to cut said cars out of said train, and rely upon defendant's inspector properly performing this duty with reference to said train; that he had a right to and did assume that the cars placed in said train where he was called

to work, had been properly inspected and had been found to be equipped with proper and safe equipments, such as hand holds, and ladders, or grab irons or such other appliances as would enable him to safely pass from one car to another without exposing himself to any unnecessary danger.

17 Plaintiff further alleges that it was the duty of the defendant company to have the ends of its cars or the end of the car which it permitted to be hauled in its train, to be equipped with sufficient hand holds, ladders or grab irons on the ends of said cars, as would enable the brakemen to safely go from one car to another in the discharge of his duties without exposing himself to unnecessary hazards and dangers.

He further alleges that it is usual and customary among well regulated railroads, operated by reasonably prudent persons, to equip its cars with such hand holds or grab irons on the ends of said cars as would enable its brakemen in the discharge of their duty to safely go from one car to another without incurring any unusual hazard or danger; and he further alleges that the defendant was negligent in the operation of its train hereinbefore complained of at the time of defendant's injury in this: That it failed to exercise ordinary care in having the cars composing said train, so equipped with hand holds, ladders or grab irons, on the ends of said cars as to enable brakemen in the discharge of their duty to safely pass from one car to another.

That it was further negligent in making up said train, in carelessly and negligently placing the oil car or tank car next to the box or refrigerator car, knowing that the platform or walk-way on said oil car was some six or seven feet lower than the top of the box or refrigerator car, without providing some means or appliances on both the refrigerator car and the oil car which would enable the brakemen to get from one car to the other without any unnecessary

18 danger, when it knew or by the exercise of ordinary care could have known, that in placing this box car or refrigerator car, equipped with hand holds or ladders down the end of said car next to the oil car, it would increase the danger to the brakemen in passing from the refrigerator car to the platform of said oil car or tank car.

Plaintiff alleges that the defendant was further negligent in permitting to go into its train and to be hauled therein, any car that was not furnished with such hand holds or grab irons on the end thereof, as would enable its brakemen to safely pass from car to car.

He further alleges that the engineer or said defendant was negligent on the occasion of defendant's injury, in permitting his air to become out of order or in carelessly manipulating his air in such manner that said train was caused to jerk violently and unusually, which jerking contributed to the injury of plaintiff's deceased as aforesaid; that the acts of negligence herein complained of were unknown to plaintiff's deceased, and that by reason of his inexperience as a brakeman, he was unable and did not appreciate the dangers arising from said acts of negligence.

That had the defendant equipped its cars with hand holds or ladders on the ends thereof, or had it placed in the making up of said

train a car so equipped next to the oil car, or had it placed in the make up of said train any car nearly on a level with the platform of the oil car, plaintiff could and would have gone onto said oil or tank car with safety, but by reason of the absence of such hand holds or ladders on the end of said box car or other proper appliances

19 which would have enabled deceased to safely go from the top of said box car to the platform of said oil car concurring with the unusual and violent jerking of defendant's train as it passed out of the station of Page, the deceased was unable to safely go from the top of said car to the platform of said oil car while in the discharge of his duty and in his effort to do so, *and in his effort to do so*, and while in the exercise of due care himself, he was thrown between the ends of said cars or fell between the ends of said cars, and injured as hereinbefore stated, and his said injuries were the direct result of the acts of negligence of the defendant hereinbefore stated.

That the defendant at the time of his death was 24 years old and was earning \$100.00 per month with a fair opportunity for an increase in his wages with the lapse of time and that he had an expectancy of life of 39 years; that he was stout, healthy and active and that he contributed all his earnings except \$15.00 or \$20.00 per month which he used for his personal expenses for the support, maintenance and comfort of his wife and child.

That he lived about three hours after the injury aforesaid, and that during said time he suffered great and excruciating mental and physical pain and agony to his damage in the sum of \$10,000.00; that by reason of the loss, support, maintenance and comfort which deceased would have contributed to his wife and child had he lived, they have been damaged in the sum of \$15,000.00.

Whereof, premises considered plaintiff prays judgment against the said defendant for the benefit of the deceased's widow and child, as above named, for the full sum of \$25,000.00 and for all other proper relief and will ever pray.

20

(Signed)

S. E. LESLIE,
J. S. BUTT, AND
W. T. FEAZEL,
Attorneys for Plaintiff.

Filed in duplicate this the 30th day of June, 1913.

ED. JONES, *Clerk.*
S. L. JONES, *D. C.*

21

Petition and Bond for Removal.

In the Circuit Court of Little River County, Ark.

SAM E. LESLIE, Adm'r,
vs.
K. C. S. Ry. Co.

This day comes defendant, by J. R. Morrell, and files its Petition and Bond for Removal of this cause to the U. S. Circuit Court, which

petition is by the court overruled, and defendant excepts, (For copy of said Petition and Bond for Removal, see Bill of Exceptions, page 48 to 55).

Thereupon, defendant files its motion to dismiss (see Bill of Exceptions p. 57), its Motion to Make Complaint more Definite and Certain (for copy see Bill of Exceptions p. 59), thereupon and on the same day, the defendant filed its Demurrer to the Plaintiff's Complaint (For copy see Bill of Exceptions, P. 61) and its Motion to Strike (see copy of Bill of Exceptions p. 63 to 67), all of which motions are by the court overruled, and defendant saves its exceptions, and thereupon files its answer herein, said answer being in words and figures as follows, to-wit:

Proceedings of July 8th, 1913.

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In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie A. Old, Deceased, et al., Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Answer to Amended Complaint.

1. Comes the defendant, the Kansas City Southern Railway Company, and reserves to itself all its rights raised by the petition and bond for removal of this case and denies that this case is pending in this court because said removal petition and bond has removed this cause to the United States Court, Western District of Arkansas, Texarkana Division, and this cause is not now legally and properly pending in this court.

2. The defendant denies that Sam E. Leslie is the administrator of the estate of Leslie A. Old and denied that said Same E. Leslie has any right whatever to bring and maintain this suit and denies that said Leslie has any right to bring and maintain this suit for the benefit of the widow of Leslie A. Old and denies that said Sam E. Leslie has any right to bring this suit for the benefit of Annie May Old and William J. Old and denies that Leslie A. Old left any children surviving him and denies that he was the husband of Annie May Old.

Further answering, defendant denies that Leslie A. Old was 23 of the age of 22 years at the time of his death. Further answering, the defendant denies that Sam E. Leslie was appointed administrator of the estate of Leslie A. Old by the Probate Court of Howard County, Arkansas, and denies that said Leslie is now acting as the administrator of the estate of said Leslie A. Old.

Further answering, the defendant denies that Leslie A. Old at the time of his injuries was in the employ of this defendant and denies that he was at the time of his injuries engaged in interstate commerce, and denies that he was at the time a brakeman upon a train of this defendant, and denies that said train was being operated

between the cities of De Queen in the State of Arkansas, and Heavener in the State of Oklahoma and denies that said Leslie A. Old was then and there employed by this defendant in interstate commerce and was actually engaged at the time of his injuries in such interstate commerce.

3. Further answering the defendant denies that Leslie A. Old at the time of his injury was engaged in the line of his duty and denies that he was called to act as swing brakeman on March 24, 1913, and denies that said Old was called for duty only a short time before a train left De Queen and denies that said Old was an inexperienced brakeman and denies that he was unfamiliar with the cars and the equipment of the cars composing said train upon which train he was to work and denies that said train was composed of 51 cars of various heights such as box cars, oil cars, tank cars, coal cars, and denies that said cars were placed or irregularly and indiscriminately in the make-up of said train, but alleges that

24 said cars were placed with reasonable care and properly and denies that there is any duty upon this defendant to arrange said cars in said train in any particular order or manner.

4. Further answering, the defendant denies that the duties of Leslie A. Old required him to look after and pass over the tops of the cars composing the middle section of said train and denies that his duties required him to look after about 17 cars located near the center of the train and denies that there were located near the rear end of the middle section of said train, two box cars or refrigerator cars of equal height, marked with the initials "SGRB Refrigerator car" and denies that immediately in front of any two such cars, there was an oil car or tank car, usually denominated "an oil car"; and denies that such car contained a large round iron tank placed upon the floor of a flat car with a railing about three feet high around the sides of said oil or tank car and denies that the railing around said tank car constituted the only walk way or passage way for brakemen to pass over said oil or tank car; and denies that said floor of said flat car was seven or eight feet lower than the run way on the top of the refrigerator car immediately in the rear and denies that there were no ladders or grab irons or hand holds on the end of the box or refrigerator car and denies that there was no other means or appliances provided whereby the brakemen might pass from one car to the other and denies that the ladder or grab irons on the refrigerator car were some distance from the end of the same and denies that the location of the ladder or grab irons on the end of the refrigerator car made it dangerous for a brakeman to go from the refrigerator car to the tank car; and denies that the absence

25 of grab irons or hand holds or ladders down the end of the refrigerator car made it necessarily hazardous for the brakemen to pass from the top of said box car or refrigerator car to said platform or walk way on the oil car; and denies that there was any danger in any parts of the mechanism of said cars; and denies that this defendant had any knowledge of any such danger; and denies

that by the exercise of ordinary care it could have had knowledge of such danger.

Further answering, the defendant denies that the oil car was without grab irons or hand holds and denies that there was any duty imposed by law upon the plaintiff to provide hand holds or grab irons on the tank car other than those that were then and there upon said tank car.

5. Further answering, defendant denies that Leslie A. Old was working upon the car at the time of his injury and denies that the air in the train just before the train reached Page failed to work properly and denies that there was any defect in the air brakes of said train and denies that said train could not be handled or controlled properly by reason of any defects in the air brakes or otherwise. Defendant denies that Leslie A. Old, after said train was stopped at Page, got on top of said train on the front end of the second car in the rear of the oil car and denies that said Old got upon said train at all after the same was stopped at Page; and denies that said Old proceeded to the front end of the middle part of said train and denies that his duty required him to pass from the refrigerator car onto the oil car and denies

26 that when said train began to move out of the station at Page, there was an unusual rocking or other movement of said train, due to any bad condition of the air and denies that said train moved from one side to the other, either by reason of any defect in the air brakes or by reason of any negligence of the engineer in handling or manipulating said train, and denies that said train began jerking and swaying violently and unusually and that said train continued so to move.

Further answering defendant denies that Leslie A. Old, the deceased, attempted in the discharge of his duty as a brakeman to pass from the refrigerator car to the oil car and denies that he attempted to pass at a time when said train was jerking violently and denies that he was injured because of the absence of ladders or hand holds or grab irons down the end of said box car or refrigerator car; and denies that said cars were improperly equipped with grab irons or hand holds and alleges that they were properly equipped and that this equipment was well known to Leslie A. Old and alleges that said equipment *was well known to Leslie A. Old and alleges that said equipment* properly enabled said Old to pass from the top of the refrigerator car on to the oil car and denies that deceased was thrown from the top of the refrigerator car and denies that he fell between the ends of the box car and the oil car immediately in front of the latter and denies that he fell by reason of the absence of any ladder, hand hold or grab irons, either on the oil car or the refrigerator car and denies that deceased was run over by defendant's train and was badly injured and denies

that said deceased died from the effects of said injuries
27 within three hours thereafter.

6. Further answering the defendant denies that plaintiff's body was mangled and injured and denies that plaintiff was conscious after his injury and denies that he suffered any conscious

suffering and denies that he suffered great physical pain and alleges that the deceased was guilty of negligence in attempting to get on said train and alleges that he was drinking and under the influence of intoxicants at the time of his injury and that he was attempting to pick a quarrel with the agent of the defendant and that he committed a violent assault upon said agent and that in committing said assault he delayed a considerable length of time in getting upon the train and thereby negligently delayed his effort to get upon said train and by reason of his negligence, he attempted to get upon said train while the same was in rapid motion and that through the fault and negligence of himself, he was caught in the wheels of said train and was run over and killed, all of which was due solely and alone to his own carelessness and negligence and to the carelessness and negligence of no one else.

7. Further answering, the defendant denies that any inspector of the defendant failed to discharge his duty in the inspection of any of said cars, and denies that any of said cars were not properly constructed and denies that said cars were without safety appliances and alleges that said cars, and each of them, had all the safety appliances required by law. Defendant denies that it was the

28 duty of said inspector to inspect said cars for the protection of the deceased and alleges that it was the duty of the deceased to inspect all of said cars before the train left the terminal and denies that the deceased had a right to rely upon the work of the inspector and alleges that it was the duty of the deceased, himself, to inspect said cars and to know that they were in proper condition. Defendant denies that any inspector had failed properly to inspect and denies that said cars or any one of them were improperly supplied with hand holds, ladders, grab irons and other safety appliances and denies that it owed to the deceased any duty to have on said cars any other appliances, hand holds, or grab irons than those that were on the same at the time of his injury, and denies that his injury was in any manner due to the absence of any safety appliances of any kind whatever.

Further answering, the defendant denies that it was its duty to have the ends of all of defendant's cars supplied with grab irons or hand holds or ladders and alleges that the great majority of cars in interstate commerce have the hand holds at the ends but on the side of the ends or on the side of the car next to the end thereof and that said placing of said hand holds is safer at or near the end than it is to be placed them upon the end. Further answering, the defendant denies that this is usual and customary among well regulated railroads operated by reasonably prudent persons to equip their cars with grab irons or hand holds on the ends of said cars and would enable its brakemen in the discharge of their duty to go safely from one car to another car without incurring unusually hazard or danger and alleges that the hazard or danger *and alleges that the*
29 *hazard or danger* cannot be prevented by any hand holds or grab irons or other safety appliances and

this danger and hazard or risk, were assumed by the deceased at the time that he entered upon his employ with the defendant.

Further answering, the defendant denies that it was negligent in the operation of its train and denies that it failed to exercise ordinary care in having the cars composing said train so equipped with grab irons, hand holds or ladders on the end of said cars so as to enable brakemen in the discharge of their duty to pass safely from one car to another and defendant alleges that it is impossible to supply hand holds or grab irons so as to remove the danger incident to the employment of passing from one car to another.

Further answering, defendant denies that it was guilty of negligence in making up its train and denies that it was negligent in placing the oil car or tank car next to the refrigerator car and denies that it was negligent in having the platform of the oil car six or seven feet lower than the top of the refrigerator car without other means of passing from the one to the other than the means that was employed and it denies that there was any hidden or unknown danger and denies that there was any danger to the deceased due to any negligence or carelessness of this defendant, and denies that there was any increased danger to the deceased by reason of the placing of the cars or by reason of the construction of the grab irons or hand holds on the same or by the absence of grab irons, hand holds or ladders on any particular part of said cars.

30 Further answering, the defendant denies that it was negligent in permitting any car to be placed in said train without proper hand holds or grab irons. Further answering, the defendant denies that its engineer was negligent on the occasion of the injury of the deceased in permitting his air to become out of order and denies that the air brakes were out of order and denies that the engineer carelessly manipulated his air and denies that the engineer caused the train to be jerked violently and unusually, and denies that the jerking of the train contributed to the injury of the deceased and denies that the deceased was without knowledge of the actual movements of said train and alleges that he knew all said movements of said train and attempted to get upon said train with full knowledge of said movements and denies that said deceased was an inexperienced brakeman and denies that he was unable to appreciate the danger rising from his employment and alleges that he did fully appreciate all the dangers incident to his employ.

Further answering, the defendant denies that cars of unusual length can be placed in a train as alleged in the complaint and denies that the deceased would not have been injured if the oil car had been placed in some other part of the train, and denies that there was any negligence due to the placing of said oil car in said train and denies that the unequal height of said cars concurring with any unusual or violent jerking of the train caused the deceased to be injured and denies that there was any unusual or violent jerking of said train and denies that said deceased was unable to go safely from the top of the refrigerator car onto the oil car while in the discharge of his duty and denies that he was in the discharge of his duty at the time of the injury but alleges that he was engaged in an unlawful attempt to commit an assault

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upon the station agent of the defendant and denies that deceased was thrown between the ends of the cars because of any negligence whatever of this defendant.

8. Further answering, the defendant denies that the deceased at the time of his death, was 24 years of age and denies that he was earning \$100 per month and denies that he had a fair opportunity for an increase in his wages and denies that he contributed his earnings to the support of the plaintiffs or any of them and denies that he contributed his wages to the support of the widow and children of the deceased and denies that he lived about three hours after the injury and denies that he suffered great and excruciating mental and physical pain and anguish during that period in the sum of \$10,000 or in any other sum and denies that the plaintiffs were damaged by reason of his death in the sum of \$15,000 for loss of maintenance and support and denies that they were damaged in the sum of \$25,000.00 or any other sum and denies that the defendant is liable to them in any sum whatever.

9. Further answering, the defendant states that the injuries of Leslie A. Old were due solely and alone to his own carelessness and negligence and not to any carelessness and negligence on the part of this defendant and alleges that his injuries were also due to the risk which he assumed when he entered upon his employment.

Premises considered, the defendant prays judgment for costs.

READ & McDONOUGH,

Attorneys for Defendant.

Filed in Open Court, July 8, 1913.

ED JONES, *Clerk.*

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In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie A. Old,
Deceased, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be It Remembered that heretofore, to-wit: on July 9th, 1913, being a regular day of the regular term of the Circuit Court within and for the County of Little River, State of Arkansas, this cause came on for trial. The said trial proceeded and the evidence was commenced on July 11th, 1913.

This cause was tried before the Honorable Jeff. T. Cowling, Judge of this court, and a jury. The plaintiffs were represented in the trial of the cause by their attorney, W. P. Feazel, and the defendant by its attorneys, James B. McDonough and June R. Morrell.

This cause was brought by the plaintiff against the defendant in this court, and said action was commenced on May 23rd, 1913 by the filing of the original complaint on that day. The said original complaint is in words and figures as follows:

Filed Sept. 20th, 1913. Ed Jones, Clerk.

33 In the Little River County Circuit Court. July Term, 1913.

SAM E. LESLIE, as Adm'r of the Estate of Leslie A. Old, Deceased,
for the Benefit of Deceased's Wife, Annie May Old and Her Infant
Child, William J. Old, Jr., Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Complaint at Law.

Now comes the plaintiff, Sam E. Leslie, as Administrator of the estate of Leslie A. Old, deceased, who sues for the benefit of deceased's wife, Annie May Old, and her infant child, William J. Old, Jr., and for his cause of action herein alleges:

That plaintiff's deceased departed this life on or about the 26th day of March, 1913, leaving him surviving as the sole beneficiaries and heirs at law, his widow, Anie May Old, who at the time of deceased's death was Twenty-two years old, and his infant child, William J. Old, Jr., about three months old.

That at the time of his death, plaintiff's deceased was a resident of Howard County, Arkansas, and had been all his life; that on or about the 21st day of May, 1913, the plaintiff, Sam E. Leslie was by the Probate Court of Howard County, Arkansas, appointed administrator of deceased's estate and that he has duly qualified and is now acting as such administrator and a copy of his letters of administration is hereto attached, marked Exhibit "A" and asks to be

34 made a part of this complaint.

Plaintiff further alleges that on and prior to the 26th day of March, 1913, and ever since that time, the defendant was a railway corporation and then owned and operated and still owns and operates a line of interstate railway, being a highway of interstate commerce, extending from Port Arthur, in the State of Texas, through the States of Texas, Louisiana, Arkansas, Oklahoma and Kansas, to Kansas City, Missouri, and was then and there a common carrier of passengers and freight for hire, and was then engaged in interstate commerce, hauling inter-state shipments and cars over its regular railroad on the said 26th day of March, 1913, and that plaintiff's deceased, Leslie A. Old, was on said day and at the time of his injuries and death hereinafter complained of, in the employment of the defendant company as its middle or swing brakeman on one of its through freight trains, which was then and there being operated between the cities of De Queen in the State of Arkansas, and Heavener in the State of Oklahoma; and that he was then and there employed by the said defendant company in inter-state commerce and was actually engaged at the time of his injuries in such inter-state commerce.

That the deceased in the discharge of his duty as such brakeman as aforesaid, was called upon the 26th day of March, 1913, to serve as

swing or middle brakeman on one of the defendant's through freight trains from De Queen, Arkansas, to Heavener, Oklahoma; that he was called for duty only a short time before said trains left DeQueen; that he was an inexperienced brakeman and was unfamiliar with the cars and the equipment of the cars composing said train upon

35 which he was to work.

That said train was composed of about 55 cars of various heights, some being box cars, some gravel cars and some oil cars, all of which were placed irregularly and indiscriminately in the make up of said train.

That the deceased being a middle or swing brakeman on said train, his duty as said brakeman required him to look after and pass over the tops of the cars composing the middle section of said train and that his beat or section of said train was composed of about 17 cars located in the center of said train; that at the rear end of deceased's section or beat on said train, there were two box cars or refrigerator cars of about equal height and that in immediately in front of these two cars there was a car usually denominated an oil car which contained a large, round iron tank placed upon a flat car and along the side of this iron tank and near the center of its height, there was constructed a narrow walk way or platform over and upon which brakemen were required to pass in going over and across said oil car.

That this platform or walk-way along the side of the oil tank was some 6 or 7 feet lower than the top of the box or refrigerator car immediately behind it.

That there were no ladders or grab irons or hand holds on the end of the box or refrigerator car immediately behind the oil car to enable the brakeman to safely get from the top of said box or refrigerator car on to the platform or run way on the oil car immediately in front of it, or any other means or appliances provided to enable

36 brakemen to safely get from the top of said box or refrigerator car onto the platform of said oil car except a ladder or grab irons or hand holds down the side of said refrigerator car

and about two feet from the end thereof. That the absence of these grab irons or hand holds down the end of the box or refrigerator car, made it unnecessarily hazardous for brakemen to pass from the top of said box car or refrigerator car to the platform or walk way on the oil car immediately in front of it, all of which was known to the defendant company, or by the exercise of ordinary care could have been so known notwithstanding it further knew that in the discharge of their duty its said brakemen were required to pass from the top of this box or refrigerator car onto the platform or walkway of the oil car.

That on the date aforesaid, just before defendant's train upon which plaintiff's deceased was working as aforesaid, reached the station of Page just over the line in the State of Oklahoma, the air on said train failed to work properly and because thereof, said train could not be handled or controlled properly or evenly, and when said train reached the station of Page, it was stopped in order to get orders controlling its future movements or for some other reason, unknown to the plaintiff, and the deceased and the conductor of said train, to-wit: One Harry Eames, alighted from said train and went

into defendant's station house at said point and after transacting such business or discharging such duties as they were required to discharge, said train was ordered to proceed on to Heavener, when deceased got on top of said train on the rear car of his beat or section, which was a box or refrigerator car and proceeded towards the front-end of his beat or section which necessarily carried him over the box or refrigerator car, immediately in the rear of the oil car

37 heretofore referred to.

That the markings and numbers of said cars are unknown to the plaintiff and for that reason he cannot more particularly describe them.

That when said train began to move out of the station of Page, because of the defective condition of the air as aforesaid, said train began jerking and swaying violently and so continued until plaintiff was injured.

That in attempting to pass from the top of the box or refrigerator car to the platform of walk way of the oil car immediately in front thereof, in the discharge of his duty as such brakeman, and while said train was jerking violently as aforesaid and because of the absence of hand holds or grab irons down the end of said box or refrigerator car, which would have enabled the brakeman to hold the same and thereby safely pass from the top of said box car or refrigerator car to the platform of the oil car said deceased was either thrown from said car or fell between the ends of the box car or refrigerator car and the oil car immediately in front thereof, and was run over by defendant's said train and was so badly mangled and injured that he died from the effects of said injury within about three hours thereafter.

That in passing over the body of plaintiff's deceased, the wheels of said train cut off both his legs below the knees and tore a great hole in his body just under his shoulder blade and crushed the back of his skull, and that from said injuries deceased died in

38 about three hours and that he was conscious from the time of his injury up until a few moments before his death.

That the train upon which deceased was working at the time of his injury as aforesaid, was made up at DeQueen and that at that point, the defendant on the day of injury and prior thereto was maintaining and had maintained an inspector whose duty it was to make careful and close inspection of all cars composing its trains before they were permitted to leave said station and to see that they were properly equipped with such safety appliances as would enable the crew of said train to discharge their duties without unnecessary hazards, and if in making such inspection, said inspector discovered any cars not so equipped or out of order, it was his duty to cut said cars out of said train, and plaintiff's deceased under the law had a right to and did rely upon the defendant's inspector properly performing this duty with reference to said train; and that he had a right to and did assume that the cars placed in said train where he was called to work, had been properly inspected and had been found to be equipped with proper and safe equipment such as hand holds, ladders or grab irons down the ends of said cars, which would enable

him to safely pass from one car to another without exposing himself to any unnecessary danger.

Plaintiff further alleges that it was the duty of the defendant company to have the ends of its cars or the ends of the cars which it permitted its trains to haul, to be equipped with sufficient hand holds or grab irons on the ends of said cars as would enable the brakemen to safely go from one car to another in the discharge of his duties, without exposing himself to unnecessary hazards and dangers.

39 He further alleges that it is usual and customary among well regulated railroads operated by reasonably prudent persons to equip *its* cars with such hand holds or grab irons on the ends of such cars as would enable *its* brakemen in the discharge of their duty to safely go from one car to another without incurring any extra or unnecessary hazard or danger, and he further alleges that the defendant was negligent in the operation of its train hereinbefore complained of, at the time of deceased's injury in this: That it failed to exercise ordinary care in having the cars composing said train so equipped with hand holds or grab irons on the ends of said cars, as to enable brakemen in the discharge of their duty to safely pass from one car to another.

That it was further negligent in making up said train, it carelessly and negligently placed the oil car next to the box car or refrigerator car knowing that the platform or walk way on said oil car was some six or seven feet lower than the top of the box or refrigerator car, without providing any means or appliances which would enable the brakemen to get from the top of said box or refrigerator car on to the platform or walk way of said oil car when it knew or by the exercise of ordinary care could have known that in placing this box car or refrigerator car unequipped with hand holds or grab irons down the end of said car next to the oil car, it would increase the danger to the brakemen in passing from the top of said box or refrigerator car to the platform of said oil car.

Plaintiff alleges that the defendant was further negligent in permitting to go into its train and to be hauled therein, any car which was not furnished with such hand holds or grab irons on the end thereof, as would enable its brakemen to safely go from car to car; that the acts of negligence herein complained of were 40 unknown to plaintiff's deceased until long after said train had left the station of De Queen and that by reason of his inexperience as a brakeman, he was unable to and did not appreciate the dangers arising from said acts of negligence; that had the defendant equipped its cars with hand holds or grab irons as the ends thereof, or had it placed in the making up of said train, a car so equipped next to the oil car, plaintiff's deceased could have and would have gone from the top of said box or refrigerator car on to the platform of said oil car in safety, but that by reason of the absence of such hand holds or grab irons, on the end of said box or refrigerator car, or some other proper appliance which would have enabled deceased to safely go from the top of said box car to the platform of said oil car, concurring with the unusual and violent jerking of the defendant's train

as it passed out of the station at Page, the deceased was unable to safely go from the top of said car to the platform or walkway on the oil car while in the discharge of his duty, and in his effort to do so, and while in the exercise of due care himself, he was thrown between the ends of the cars or fell between the ends of said cars, and was injured as hereinbefore stated, and that his said injuries were the direct result of the acts of negligence of the defendant, as hereinbefore stated.

That the deceased, at the time of his death was 24 years old and was earning \$100.00 per month with a fair chance for an increase in his wages and had a life expectancy of 39 years; that he was stout, healthy and active and that he contributed all of his earnings except about \$15.00 or \$20.00 per month, which he used for his personal expenses, to the support, maintenance and comfort of his wife and child.

That he lived about three hours after the injuries aforesaid, and during said time he suffered great and excruciating mental and physical pain and agony to his damage in the sum of \$10,000.00. That by reason of the loss of support, maintenance and comfort which deceased would have contributed to his wife and child, had he lived, they have been damaged in the sum of \$15,000.00.

Wherefore, premises considered, plaintiff prays judgment against the said defendant for the benefit of deceased's widow and child as above named for the full sum of \$25,000.00 and for all other proper relief and will ever pray.

J. E. LESLIE,
J. S. BRITT,
W. P. FEAZEL,
Attorneys for Plaintiff.

Filed in duplicate before process issued this the 23rd day of May, 1913.

ED JONES, *Clerk.*
S. L. JONES, *D. C.*

Summons issued May 23, 1913. Served May 23, 1913.

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EXHIBIT "A."

Letters of Administration.

STATE OF ARKANSAS,

County of Howard:

Estate of Leslie A. Old, Deceased.

State of Arkansas to all persons — whom these presents shall come,
Greeting:

Know Ye, That whereas, Leslie A. Old, of the County of Howard and State of Arkansas, died intestate, as it is said, on or about the

26th day of March, 1913, having at the time of his death personal property in this court, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same. To the end therefore that the said property may be collected, reserved and disposed of according to law, we do hereby appoint Sam E. Leslie administrator of all and singular the goods and chattels, rights and credits, which were of the said Leslie A. Old at the time of his death, with full power and authority to dispose of said property according to law and collect all moneys due said deceased, and, in general, do and perform all other acts and things, which are or hereafter may be, required of him by law.

In testimony whereof, I, C.G. Hughes, clerk of the said Court in and for the county of Howard aforesaid, have hereunto set my hand and affixed the seal of said court, at my office in Nashville this 21st day of May, 1913.

C. G. HUGHES, *Clerk.*

43 I, C. G. Hughes, Clerk of Howard County, do hereby certify that the foregoing was filed in my office for record on the 21st day of May, 1913, and that the same is now duly recorded.

[SEAL.] (Signed)

C. G. HUGHES, *Clerk.*

44 On June 30th, 1913, and less than ten days before the commencement of this court, and without any order or leave of the court, the plaintiff herein filed an amended complaint, which amended complaint is in words and figures as follows:

In the Little River County Circuit Court, July Term, 1913.

SAM E. LESLIE, as Administrator of the Estate of Leslie A. Old, Deceased, for the Benefit of Deceased's Wife, Annie May Old, and Her Infant Child, William J. Old, Jr., Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Amended Complaint at Law.

"Now comes the plaintiff, Sam E. Leslie as Administrator of the estate of Leslie A. Old, deceased, who sued for the benefit of deceased's wife, Annie May Old, and her infant child, William J. Old, Jr., and for his cause of action herein alleges:

"That plaintiff's deceased departed this life on or about the 24th day of March, 1913, leaving him surviving as the sole beneficiaries and heirs at law, his widow, Annie May Old, who at the time of deceased's death was 22 years old, and his infant child, William J. Old, Jr., about three months old.

"That at the time of his death, plaintiff's deceased was a resident of Howard County, Arkansas, and had been all his life; that on or about the 21st day of May, 1913, the plaintiff, Sam E. Leslie was by

the Probate Court of Howard County, Arkansas, appointed
45 Administrator of deceased's estate, and that he has duly qualified and is now acting as such administrator and a copy of his letters of administration is hereto attached, marked exhibit "A" and asks to be made a part of this complaint.

"Plaintiff further alleges that on and prior to the 24th day of March, 1913, and ever since that time, the defendant was a railway corporation and then *and* owned and operated and still owns and operates a line of interstate railway, being a highway of Interstate Commerce, extending from Port Arthur in the State of Texas, through the States of Texas, Louisiana, Arkansas, Oklahoma and Kansas to Kansas City, Missouri, and was then and there a common carrier of passengers and freight for hire and was then engaged in inter-state commerce, hauling interstate shipments and cars over its railroads on the said 24th day of March, 1913, and that plaintiff's deceased, Leslie A. Old, was on said day and at the time of his injuries and death hereinafter complained of, in the employment of the defendant company as its middle or swing brakeman on one of its through freight trains which was then and there being operated between the cities of De Queen in the State of Arkansas, and Heavener in the State of Oklahoma, and that he was then and there employed by the said defendant company in inter-state commerce and was actually engaged at the time of his injuries in such inter-state commerce.

"That the deceased in the discharge of his duty as such brakeman as aforesaid, was called on the 24th day of March, 1913, to serve as swing or middle brakeman on one of defendant's through freight trains from De Queen, Arkansas, to Heavener, Oklahoma; that he was called for duty only a short time before said train left
46 De Queen; that he was an inexperienced brakeman and was unfamiliar with the cars and the equipments of the cars composing said train upon which he was to work; that said train was composed of 51 cars of various heights, some being box cars, some oil cars or tank cars, some coal cars, all of which were placed irregularly and indiscriminately in the make-up of said train.

"That the deceased being a middle or swing brakeman, on said train, his work required him to look after and pass over the tops of the cars composing the middle section of said train and that his beat or section of said train was composed of about 17 cars located in or near the center of said train. That at or near the rear end of deceased's section or beat on said train, there were two box cars or refrigerator cars of equal height, marked with the initials "S. F. R. D. Refrigerator Car" of about equal height and that immediately in front of these two cars there was an oil car or tank car, usually denominated an oil car, which contained a large round iron tank, placed upon the floor of a flat car, with a railing about three feet high around the sides of said oil or tank car and the space of the floor between this side railing and the tank, constituted the only walk way or passage way provided for brakemen to pass over said oil or tank car, and this floor was seven or eight feet lower than the run-

way on the top of the refrigerator car immediately in its rear; that there were no ladders or grab irons or hand holds on the end of the box or refrigerator car, immediately behind the oil car to enable or assist the brakemen to safely get from the top of the box or refrigerator cars onto the platform or run-way of the oil car

47 immediately in front of it or any other means or appliances whatever provided by said defendant company to enable its brakemen to safely get from the top of said box car or refrigerator car onto the platform or floor of said oil car or tank car, except a ladder or grab iron down the side of the said refrigerator car some distance from the end thereof, which made it necessarily dangerous for the brakemen in going from the refrigerator car to the tank car. That the absence of these grab irons or hand holds or ladders down the end of the box or refrigerator car, made it unnecessarily hazardous for the brakemen to pass from the top of said box or refrigerator car to said platform or walk-way on the oil car immediately in front of it, all of which was known to the defendant company or by the exercise of ordinary care could have become known to it.

"Plaintiff further alleges that there were no grab irons or hand holds on the end of the oil car or tank car immediately in front of the refrigerator car, or any other appliances thereon, to enable brakemen in passing from the rear car to the oil car or tank car to hold to and steady himself while making said passage.

"That on the date aforesaid, just before defendant's train upon which plaintiff's deceased was working as aforesaid, reached the station of Page, just over the line in the State of Oklahoma, the air in said train failed to work properly, and because thereof said train could not be handled or controlled properly, or evenly, and when said train reached said station of Page, it was stopped in order to get orders controlling its future movements, and the deceased and

48 the conductor of said train one Harry Eames alighted from said train and went into defendant's station house or waiting room at said point and after transacting such business and discharging such duties as they were required to discharge, said train was ordered to proceed on to Heavener and thereupon the deceased got on top of said train on the front end of the second car in the rear of the oil or tank car above described, which was one of the refrigerator cars, marked with the initials aforesaid, and proceeded towards the front end of his beat or section, which carried him over the refrigerator car immediately in the rear of the oil cars heretofore referred to.

"That when said train began to move out of the station of Page, because of the defective condition of the air as aforesaid, or from the negligence of the engineer in manipulating the air, of said train, or from some other reason unknown to plaintiff, said train began jerking and swaying violently and unusually, and so continued until plaintiff was injured.

"That in attempting to pass from the top of the box or refrigerator car onto the oil car immediately in front thereof, in the discharge of his duty as such brakeman, and when said train was jerking violently as aforesaid and because of the absence of ladders or hand-holds or grab irons down the end of said box or refrigerator car,

which would have enabled the deceased to hold and thereby safely pass from the top of said box or refrigerator car onto the oil car, the said deceased was either thrown from said car or fell between the ends of the box car or refrigerator car and the oil car immediately in front thereof, and because of the absence of any ladder, hand holds or railing on the end of said oil car or tank car, which would have enabled deceased to hold to while making such passage, said
49 defendant was run over by defendant's said train and was so badly mangled and injured that he died from the effects of said injury within about three hours thereafter.

That in passing over the body of plaintiff's deceased, the wheels of said train cut off both his legs below the knees and tore a hole in his body just below the shoulder blade and crushed his left shoulder and so injured the back of his skull that from the effects of said injury, deceased died as aforesaid, but that he was conscious from the time of his said injury up until a few moments before he died, during all of which time he suffered great physical and mental pain.

"That the train upon which deceased was working at the time of his injury aforesaid, was made up at De Queen, Arkansas, and that at that point, the defendant on the day of the injury and prior thereto, was maintaining and had maintained an inspector whose duty it was to make careful and close inspection of all cars composing its trains before they were permitted to leave said station and to see that they were properly equipped with such safety appliances as would enable the crew of said train to discharge their duty without unnecessary hazards and if in making such inspection said inspector discovered any cars not so equipped, it was his duty to cut said cars out of said train, and plaintiff's deceased under the law had a right to and did rely upon defendant's deceased *under the law had a right to and did rely upon defendant's* Inspector properly performing this duty with reference to said train; that he had a right to and did

50 assume that the cars placed in said train where he was called to work, and been properly inspected and had been found to be equipped with proper and safe equipments, such as hand holds, and ladders, or grab irons or such other appliances as would enable him to safely pass from one car to another without exposing himself to any unnecessary danger.

"Plaintiff further alleges that it was the duty of the defendant company to have the ends of its cars or the end of the car which it permitted to be hauled in its train, to be equipped with sufficient hand holds, ladders or grab irons on the ends of said cars, as would enable a brakeman to safely go from one car to another in the discharge of his duties without exposing himself to unnecessary hazards and dangers.

"He further alleges that it is usual and customary among well regulated railroads, operated by reasonably prudent persons, to equip its cars with such hand holds or grab irons on the ends of said cars as would enable its brakemen in the discharge of their duty to safely go from one car to another without incurring any unusual hazard or danger; and he further alleges that the defendant was negligent in the operation of its train hereinbefore complained of

at the time of defendant's injury in this: That it failed to exercise ordinary care in having the cars composing said train, so equipped with hand holds, ladders or grab irons, on the ends of said cars as to enable brakemen in the discharge of their duty to safely pass from one car to another.

"That it was further negligent in making up said train, in carelessly and negligently placing the oil car or tank car next to the box car or refrigerator car, knowing that the platform or
51 walk way on said oil car was some six or seven feet lower than the top of the box or refrigerator car, without providing some means or appliances on both the refrigerator car and the oil car which would enable the brakemen to get from one to the other without any unnecessary danger when it knew or by the exercise of ordinary care could have known, that in passing this box car or refrigerator car, unequipped with hand holds or ladders down the end of said car next to the oil car, it would increase the danger to the brakemen in passing from the refrigerator car to the platform of said oil car or tank car.

"Plaintiff alleges that *that* the defendant was further negligent in permitting to go into its train and to be hauled therein, any car that was not furnished with such hand holds or grab irons on the end thereof, as would enable its brakemen to safely pass from car to car.

"He further alleges that the Engineer of said defendant was negligent on the occasion of defendant's injury, in permitting his air to become out of order or in carelessly manipulating his air in such a manner that said train was caused to jerk violently and unusually, which jerking contributed to the injury of plaintiff's deceased as aforesaid; that the acts of negligence herein complained of were unknown to plaintiff's deceased, and that by reason of his inexperience as a brakeman, he was unable and did not appreciate the dangers arising from said acts of negligence.

"That had the defendant equipped its cars with hand holds
52 or ladders on the ends thereof, or had it placed in the making up of said train a car so equipped next to the oil car, or had it placed in the make up of said train any car nearly on a level with the platform of the oil car, plaintiff could and would have gone onto said oil or tank car with safety, but by reason of the absence of such hand holds or ladders on the end of said box car or other proper appliances which would have enabled deceased to safely go from the top of said box car to the platform of said oil car concurring with the unusual and violent jerking of defendant's train as it passed out of the station of Page, the deceased was unable to safely go from the top of said car to the platform of said oil car while in the discharge of his duty and in his effort to do so, and while in the exercise of due care himself, he was thrown between the ends of said cars or fell between the ends of said cars, and injured as hereinbefore stated, and his said injuries were the direct result of the acts of negligence of the defendant hereinbefore stated.

"That the defendant at the time of his death was 24 years old and was earning \$100.00 per month with a fair opportunity for an in-

crease in his wages with the lapse of time and that he had an expectancy of life of 39 years; that he was stout, healthy and active and that he contributed all his earnings except \$15.00 or \$20.00 per month which he used for his personal expenses for the support, maintenance and comfort of his wife and child.

"That he lived about three hours after the injury aforesaid, and that during said time he suffered great and excruciating mental and physical pain and agony to his damage in the sum of \$10,000.00; that by reason of the loss, support, maintenance and comfort which deceased would have contributed to his wife and child had he lived, they have been damaged in the sum of \$15,000.00.

"Wherefore premises considered plaintiff prays judgment against the said defendant for the benefit of the deceased's widow and child as above stated, for the full sum of \$25,000.00, and for all other proper relief and will ever pray.

S. E. LESLIE,
J. S. BUTT &
W. P. FEAZEL,
Attorneys for Plaintiff."

54

EXHIBIT "A".

Letters of Administration.

STATE OF ARKANSAS,
County of Howard:

Estate of LESLIE A. OLD, Deceased.

State of Arkansas to all persons whom these presents shall come,
Greeting:

Know Ye, That whereas, Leslie A. Old, of the County of Howard and State of Arkansas, died intestate, as it is said, on or about the 26th day of March, 1913, having at the time of his death personal property in this county, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same. To the end therefore that the said property may be collected, reserved and disposed of according to law, we do hereby appoint Sam E. Leslie administrator of all and singular the goods and chattels, rights and credits, which were of the said Leslie A. Old, at the time of his death, with full power and authority to dispose of said property according to law and collect all moneys due said deceased, and, in general, do and perform all other acts and things, which are or hereafter may be required of him by law.

In testimony whereof, I, C. G. Hughes, Clerk of said Court in and for the county of Howard aforesaid, have hereunto set my hand and affixed the seal of said court, at my office in Nashville, this 21st day of May, 1913.

C. G. HUGHES, *Clerk.*

55 I, C. G. Hughes, Clerk of Howard County, do hereby certify that the foregoing was filed in my office for record on the 21st day of May, 1913, and that the same is now duly recorded.

Witness my hand this 21st day of May, 1913.

[SEAL.] (Signed)

C. G. HUGHES, *Clerk.*"

56 The Court herein opened in regular session on July 7, 1913. On July 7th, 1913, the defendant herein filed its Petition and Bond for the removal of this cause to the United States District Court for the Western District of Arkansas, Texarkana Division. The said Petition and Bond for Removal are in words and figures as follows:

57

In the Little River Circuit Court.

SAM E. LESLIE, as Administrator of the Estate of Leslie A. Old, Deceased, for the Benefit of Deceased's Wife, Annie May Old, and Her Infant Child, William J. Old, Jr., Plaintiff,

VS.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Petition and Bond for the Removal of said Cause to the United States District Court.

To the Honorable the Circuit Court of Little River County, Arkansas:

Your petitioner, the Kansas City Southern Railway Company, hereby petitions this honorable court to remove this cause before the trial thereof to the United States District Court for the Western District of Arkansas, Texarkana Division, and respectfully alleges and shows to this honorable court that the said The Kansas City Southern Railway Company is the defendant in this cause, which cause is of a civil nature, and which cause is now pending in this court. Your petitioner alleges that the amount and matter in dispute in this cause, exclusive of interest and costs, exceeds the sum of \$3,000.00.

Your petitioner alleges that the plaintiff, Sam E. Leslie, Administrator of the Estate of Leslie A. Old, brings this suit against your petitioner for alleged damages due to the alleged killing of Leslie A. Old, and your petitioner is made the defendant
58 in said suit, and said plaintiff in said suit prays judgment against your petitioner in the sum of \$25,000.00.

Your petitioner further alleges in this its petition for removal, that it denies liability to the plaintiff.

Your petitioner further alleges that the plaintiff Sam E. Leslie, was at the time of the commencement of this action, and still is, a citizen and resident of the Western District of Arkansas, Texarkana Division, and he lives within said Western District of Arkansas, Texarkana Division.

Your petitioner further alleges that it is the defendant, and it is a railroad corporation organized and existing under the laws of the State of Missouri, and is a citizen and resident of said State of Missouri, and was such citizen and resident of the State of Missouri at the time of the commencement of this action, and still is such citizen and resident. Your petitioner therefore alleges that the plaintiff and the defendant are citizens of different States, the plaintiff being a citizen of the State of Arkansas, and the defendant a citizen and resident of the State of Missouri, and your petitioner is therefore entitled to remove this cause to the said United States District Court for the Western District of Arkansas, Texarkana Division, upon the ground of the diversity of citizenship of the plaintiff and the defendant herein.

Your petitioner further shows and alleges that its time for filing answer or otherwise pleading in this cause has not expired, and it has given to the plaintiff herein, and to the counsel of record,
59 as the law requires, written notice of the filing of this petition for removal.

Your petitioner therefore asks that this cause be removed under the laws and statutes of the United States in such cases made and provided, and it herewith offers good and sufficient bond for the removal of this cause as required by law, and asks that this court proceed no further herein except to make the order of removal.

II.

For further ground of removal your petitioner alleges the facts set forth in paragraph I of this petition for removal, and adopts and makes said paragraph I a part of this paragraph, for the purpose of praying a removal of this cause to the United States District Court aforesaid.

Your petitioner alleges that the Act of Congress of April 22nd, 1908, 35 United States at Large, page 65 being an amendment to the Federal Employers' Liability Act, is unconstitutional, being against the Constitution of the United States, and is void because in conflict with the said Constitution, in that it denies to the defendant herein the equal protection of the laws, guaranteed to the defendant under Articles 5 and 14 of the Constitution of the United States, being Amendment numbered 5 and 14. The said Act of Congress also in attempting to take away from a non-resident defendant in cases of this kind, violates the Constitution of the United States,

because it denies to the defendant a property right guaranteed to the defendant under amendments numbered 5 and
60 14 to the Constitution of the United States. The said Act of Congress of date April 22nd, 1908, in attempting to deny to this defendant and other common carriers the right to removal of causes on the ground of the diversity of citizenship makes said Act of Congress void, because it deprives this defendant of its property rights and of the equal protection of the laws, contrary to said amendments to the Constitution of the United States, said Act of Congress being arbitrary and unreasonable, and an unlawful discrimination against this defendant in contravention of said Articles

of the Constitution of the United States. The said Act of Congress is illegal and void, because it denies to your petitioner a right to remove a cause arising under the laws and Constitution of the United States, and because it denies the right to remove said cause on the ground of diversity of citizenship as above set forth.

III.

For a further cause of removal your petitioner alleges and sets forth all of the facts named and referred to in paragraphs 1 and 2 above set out, and makes said paragraphs a part of this paragraph, as an additional ground for the removal of this cause to the said United States District Court for the Western District of Arkansas.

As an additional ground for the removal of this cause your petitioner, upon the facts above referred to and made a part hereof, expressly alleges that a Federal question is involved herein 61 on the construction of said Act of Congress as it is necessary to construe the Constitution of the United States, and said Act if Congress and this Federal question is shown upon the allegations in the complaint, and in determining the rights between the plaintiff and the defendant it is necessary and essential to construe an Act of Congress as plaintiff's right of recovery is alleged to depend upon said Act of Congress, and therefore a Federal question is involved herein, and this defendant seeks to remove this cause to said United States District Court for the Western District of Arkansas, upon the further ground that said Federal question is involved, and that the determination of the rights between the plaintiff and this defendant depend upon the decision of a Federal question and the construction of the United States Statutes and the construction of the Constitution of the United States.

Your petitioner therefore alleges that it is entitled to remove this cause to said United States Court, because the rights of plaintiff and defendant depend upon the construction of said Acts of Congress and the Constitution of the United States, including the Act of Congress of March 3, 1911, being Section 28 of the Judicial Code of the United States, found in 36 U. S. Statutes at Large, page 1094.

IV.

Your petitioner further alleges that it is entitled to remove this cause to the United States District Court for the Western District of Arkansas, upon the further ground that under the allegations of

the complaint the right of the plaintiff to recover depends 62 upon a construction of the safety appliance Act of Congress.

For this ground of removal your petitioner adopts and makes each of the paragraphs above set forth a part of this paragraph, and prays a removal of this cause upon the further ground that the complaint of the plaintiff herein involved a construction of the Act of Congress, and therefore raises a Federal question, and entitled this defendant to remove this cause on that ground, and that right exists, notwithstanding the Act of Congress of April 22, 1908, as said Act of Congress is void, and of no effect in so far as it attempts

to deny to this petitioner the right to remove this cause to the United States District Court on the grounds above set forth, including the ground named, and set out in this paragraph.

Your petitioner further alleges and shows that it seeks to remove this cause upon each and every one of the grounds above set forth, to the United States District Court for the Western District of Arkansas, Texarkana Division.

Therefore, your petitioner presents this its petition and bond for said removal on each of the grounds above set forth, the bond herein being a good and sufficient bond as required by law, for the defendant's entering into said District Court of the United States for the Western District of Arkansas, Texarkana Division, and within the time required by the law a copy of the record in this suit, and for paying all costs that may be awarded by said court, if the said court should hold that this cause was wrongfully or improperly removed thereto.

Wherefore your petitioner prays that this court proceed no further in this cause, except to approve the bond and make the order of removal, and that this suit be accordingly removed, pursuant to the statutes of the United States in such cases made and provided, and your petitioner will ever pray.

THE KANSAS CITY SOUTHERN RAIL-
WAY COMPANY,
By JAMES B. McDONOUGH, *Its Attorney.*

64 *Affidavit.*

STATE OF ARKANSAS,
County of Sebastian:

I, James B. McDonough, on oath state that I am one of the attorneys of The Kansas City Southern Railway Company, the petitioner in the above petition for removal, and that I am authorized to make this affidavit, and that the matters and things set forth in the above and foregoing petition for removal of this cause are true to the best of my knowledge and belief.

JAMES B. McDONOUGH.

Subscribed and sworn to before me this 3rd day of July, 1913.

HARRY P. DAILY,
Notary Public.

My commission expires June 15, 1915.

65

In the Little River Circuit Court.

SAM E. LESLIE, as Administrator of the Estate of Leslie A. Old, Deceased, for the Benefit of Deceased's Wife, Annie May Old, and Her Infant Child, William J. Old, Jr., Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Bond for Removal.

Know all men by these presents:

That we, The Kansas City Southern Railway Company, as principal, and the National Surety Company, and James B. McDonough, as sureties, are held and firmly bound unto Sam E. Leslie, as Administrator of the Estate of Leslie A. Old, deceased, and Annie May Old and William J. Old, Jr., in the penal sum of \$500.00 for the payment whereof, well and truly to be made unto the said Sam E. Leslie, as Administrator of the estate of Leslie A. Old, and Annie May Old and William J. Old, Jr., their heirs, representatives and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and firmly by these presents:

Upon condition nevertheless, that whereas the said The Kansas City Southern Railway Company has filed its petition in the circuit court of Little River County of the State of Arkansas, for the removal of a certain cause therein pending, wherein the said Sam E. Leslie, as Administrator of the estate of Leslie A. Old, deceased, and Annie May Old and William J. Old, Jr., are plaintiffs and the said The Kansas City Southern Railway Company is defendant, 66 to the District Court of the United States, for the Western District of Arkansas, Texarkana Division.

Now, if the said The Kansas City Southern Railway Company shall enter in the said District Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness whereof we, the said The Kansas City Southern Railway Company, and the National Surety Company and James B. McDonough, have hereunto set our hands and seals this 3rd day of June, 1913.

THE KANSAS CITY SOUTHERN RAILWAY,
By JAMES B. McDONOUGH, *Its Attorney*;
NATIONAL SURETY COMPANY,
By JAMES B. McDONOUGH, *Attorney-in-Fact.*

67

The court denied said petition on the ground that this is not a cause that can be removed, and not on the ground that the bond or security offered was not sufficient. The defendant at the

time excepted to the action of the court in denying its petition for removal of said cause. The said petition was filed within the time required by the law, and was not denied on that ground.

On July 8, 1913, the defendant filed in open court herein a motion to dismiss the complaint for uncertainty. The said motion is in words and figures as follows:

68 In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
et al., Plaintiffs,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion to Dismiss Complaint for Uncertainty.

Comes the defendant and moves the court herein to dismiss the complaint because said complaint is indefinite and uncertain and does not state a cause of action in the language required by the statutes of the State of Arkansas.

Premises considered, the defendant prays judgment.

JAMES B. McDONOUGH,
Attorney for Defendant.

69 The court overruled said motion to dismiss the complaint and the defendant at the time excepted. Thereafterwards, and on the same day, the defendant filed in open court a motion to make the complaint more definite and certain. The said motion is in words and figures as follows:

70 In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie A. Old,
Deceased, et al., Plaintiffs,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion to Make Complaint More Definite and Certain.

Comes the defendant and moves the court to require the plaintiffs to make their complaint more definite and certain in the following particulars, to-wit:

1. To allege and show specifically what act of negligence caused plaintiff's injury and to show that distinctly and without being in the alternative.

2. To allege and show on what part of said refrigerator car the alleged hand holds should have been placed.

3. To allege and show on what part of the oil cars the hand holds should have been placed.

4. To allege and show in what manner the said cars should have been equipped with hand holds, ladders or grab irons.

5. To allege and show what act of negligence or acts of negligence caused plaintiff's injury and in what manner they were caused.

In support of this motion to require plaintiffs to make their complaint more definite and certain, defendant shows by the complaint that the more important allegations are alleged in the alternative and defendant can not tell what act of negligence or acts of negligence plaintiffs rely upon for recovery.

Premises considered, defendant prays that said complaint be dismissed unless same be made more definite and certain, as herein prayed.

JAMES B. McDONOUGH,
Attorney for Defendant.

72 The court overruled the said Motion to make said Complaint More Definite and Certain, and the defendant at the time excepted to the action of the court, in overruling said motion.

Thereupon, and on the same day, the defendant filed a demurrer to the complaint herein. The demurrer is in words and figures as follows:

73 In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
et al., Plaintiffs,

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Demurrer.

Comes the defendant and demurs to the complaint herein on the following grounds:

I.

Said complaint is indefinite and uncertain and the alleged causes of action are not clearly and distinctly shown and stated in the language required by the law.

2.

Said complaint does not state facts sufficient to constitute action against this defendant.

Premises considered, the defendant prays judgment.

JAMES B. McDONOUGH,
Attorney for Defendant.

74 The court overruled said demurrer and the defendant at the time excepted to the action of the court in overruling said demurrer.

Thereupon, and on the same day, the defendant filed in open court herein a motion to strike from the amended complaint certain parts thereof. The said motion to strike is in words and figures as follows:

75

In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
et al., Plaintiffs,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion to Strike.

Comes the defendant, the Kansas City Southern Railway Company and moves the court to strike from the complaint herein the following allegations:

1st. On Page 2 as follows: "That the deceased in the discharge of his duty as brakeman as aforesaid was called on the 24th day of March, 1913, to serve as swing or middle brakeman on one of its through freight trains from De Queen, Arkansas, to Heavener, Oklahoma. That he was called for duty only a short time before said train left De Queen," and also "That said train was composed of fifty-one cars of various heights, some being box cars, some oil cars or tank cars and some coal cars, all of which were placed irregularly and indiscriminately in the makeup of said train."

And also the following on said page 2: "That at or near the rear end of deceased's section or beat on said train there were two box cars or refrigerator cars of equal height marked with the initials S. F. R. D. Refrigerator Car, all being of equal height and that immediately in front of these two cars there was an oil car or tank car,

usually denominated an oil car, which contained a large iron tank placed upon the floor of a flat car with a railing about three feet high around the sides of said oil or tank car, and the space of the floor between this side railing and the tank constituted the only walk-way or passage-way provided for brakemen to pass over said oil or tank car, and this floor was seven or eight feet lower than the run way on the top of the refrigerator car immediately in its rear."

And also to strike from said complaint on page 3, the following: "That the absence of these grab irons or hand holds or ladders down the end of the box or refrigerator car made it unnecessarily hazardous for the brakemen to pass from the top of said box or refrigerator car to said platform or walk-way of the oil car immediately in front of it. All of which was known to the defendant company or by the exercise of ordinary care could have been so known by it."

Also to strike from said page the following: "Plaintiff further alleges that there were no grab irons or hand holds on the end of the oil car or tank car immediately in front of the refrigerator car, or any other appliance thereon to enable brakemen in passing from the

rear car to the oil or tank car, to hold to and steady *himself* while making said passage."

And also the following on said page: "That when said train began to move out of the station of Page, because of the defective condition of the air as aforesaid or from the negligence of the engineer in manipulating the air of said train, or from some other reason unknown to the plaintiffs, said train began jerking and swaying violently and unusually, and so continued until plaintiff was injured."

And also to strike from page 4 of said complaint the following: "Which would have enabled the deceased to hold and thereby safely pass from the top of said box car or refrigerator car on to the oil car. The said deceased was either thrown from said car or fell between the ends of the box car and the oil car."

And also to strike from said page of said complaint the following: "And because of the absence of any ladder, hand-holds or railing on the end of said oil car or tank car, which would have enabled deceased to hold to while making said passage, said plaintiff was run over by its said train."

And also to strike from said last mentioned page the following: "The defendant, on the date of the injury and prior thereto was maintaining and had maintained an inspector whose duty it was to make careful and close inspection of all cars composing its trains before they were permitted to leave said station, and to see that they were properly equipped with such safety appliances as would enable the crew of said train to discharge their duty without unnecessary hazard."

And also to strike from said page of said complaint the following: "It was his duty to cut said cars out of said train and plaintiff's deceased, under the law had a right to and did rely upon its inspector properly performing this duty with reference to said train. That he had a right to and did assume that the cars placed in said train where he was called to work had been properly inspected and had been found to be equipped with proper and safe equipments."

And also to strike from page 5 of said complaint the following: "Plaintiff further alleges that it was the duty of the defendant company to have the ends of its cars, or the ends of the cars which it permitted to be hauled in its train to be equipped with sufficient hand holds, ladders or grab irons on the ends of said cars as would enable the brakemen to safely go from one car to another in the discharge of his duties, without exposing himself to unnecessary hazards and dangers."

And also to strike from said last mentioned page of said complaint the following: "He further alleges that it is usual and customary among well regulated railroads, operated by reasonably prudent persons, to equip its cars with such hand holds or grab irons on the ends of said cars as would enable its brakemen in the discharge of their duty to safely go from one car to another without incurring any unusual hazard or danger; and he further alleges that the defendant was negligent in the operation of its train hereinbefore complained of at the time of defendant's injury in this: That he failed to exercise ordinary care in having the cars composing said train so equipped

with hand holds, ladders or grab irons on the ends of said cars as to enable brakemen in the discharge of their duty to safely pass from one car to another."

And also to strike from said last mentioned page of said complaint, the following: "That it was further negligent in making up said train, in carelessly and negligently placing the oil car or tank car

79 next to the box or refrigerator car, knowing that the platform or walk-way on said oil car was some six or seven feet lower than the top of the box or refrigerator car, without providing some means or appliances on both the refrigerator car and the oil car which would enable the brakemen to get from one car to another without any unnecessary danger."

And also to strike from page 6 of said complaint the following: "And he further alleges that the engineer of said defendant was negligent on the occasion of defendant's injury in permitting the air to become out of order or in carelessly manipulating his air in such a manner that said train was caused to jerk violently and unusually."

And also to strike from said last mentioned page of said complaint the following: "That had the defendant equipped its cars with hand holds or ladders on the ends thereof or had it placed in the making up of said train a car so equipped next to the oil car, or had it placed in the make up of said train any car nearly on a level with the platform of the oil car, plaintiff could and would have gone onto said oil or tank car with safety."

And also to strike from said last mentioned page of said complaint the following: "But by reason of the absence of such hand holds or ladders on the end of said box car or other proper appliances which would have enabled deceased to safely go from the top of said box car to the platform of said oil car concurring with the unusual and violent jerking of defendant's train as it passed out of the station of Page, the deceased was unable to safely go from the top of said car to the platform of said oil car while in the discharge of his duty."

80 And also to strike from said complaint on the last page thereof the following: "And in his effort to do so and while in the exercise of due care himself, he was thrown between the ends of said cars, or fell between the ends of said cars and injured, as hereinbefore stated and his said injuries were the direct result of the acts of negligence of the defendant herein before stated.

Premises considered, the defendant prays that each and every one of the quotations above given from said complaint be stricken therefrom. This motion being directed separately and distinctly to each quotation, basing said motion separately upon each quotation above given.

JAMES B. McDONOUGH,
Attorney for Defendant.

81 The court overruled said motion to strike, and each part thereof, and the defendant saved an exception to the action of the court in overruling said motion as a whole and also in overruling and denying each paragraph of said motion.

Thereupon, the defendant filed its answer to the amended complaint, and the cause proceeded to trial as herein shown.

On the 12th day of July, 1913, one of the jurors in this cause became ill, and the court on its own motion excused the jury in this cause, after duly cautioning them, and postponed the cause for further hearing until July 17th, 1913. On July 17th, 1913, the said cause was again called, and the trial proceeded. The defendant objected to proceeding with said cause on the ground that the jury had been engaged in the trial of other causes, and that it was improper and illegal to try this cause with said jury after they had been engaged in the trial of other cases. It was admitted that the jury had been engaged in the trial of other cases between July 12th and July 17th. The court overruled the motion of the defendant to secure another jury, or to postpone this case until another term on that ground, and the defendant excepted.

Before this cause came on for trial on July 10th, the defendant filed a motion for a continuance herein. The said Motion for Continuance is in words and figures as follows:

82 In the Circuit Court of Little River County.

SAM E. LESLIE,

VS.

K. C. S. Ry. Co.

This day comes defendant by Jas. B. McDonough, its attorney, and files its motion for a continuance herein, which upon being heard by the court is overruled. To which ruling and judgment of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done. (Said Motion for a Continuance being in words and figures as follows, to-wit:)

Proceedings of July 11th, 1913.

83 In the Little River Circuit Court.

SAM E. LESLIE, Administrator, Plaintiff,

VS.

THE KANSAS CITY SOUTHERN RY. Co., Defendant.

Motion for Continuance.

Comes the defendant, the Kansas City Southern Railway Company, and moves the court for a continuance of this cause until the next term of this court, upon the following grounds:

I.

The original complaint herein, which complaint is hereto attached, and made a part of this motion, is too indefinite, uncer-

tain and incomplete to enable the defendant to prepare its defense herein in the following particulars, to-wit:

a. The said complaint did not allege or show the number of the train or otherwise describe the same, on which the deceased was working at the time of his injury, but alleges that deceased was called to leave De Queen on March 26, 1913, whereas in the amended complaint which is also made a part of this motion, it is alleged that deceased was called to leave De Queen on March 24, 1913, making two days' difference in the time of the leaving of said trains from the terminal De Queen, and as the train is not otherwise described or numbered, and as the cars in said original complaint are not described by number, these discrepancies in date make it more difficult to locate the history of said cars which is
84 necessary to the defendant's defense as is hereafter shown.

b. In the original complaint it is alleged as affiant understands said complaint, that the train in controversy left De Queen the terminal, on March 26, 1913, and contained 55 cars, whereas in the amended and substituted complaint it is alleged that said train left De Queen, the terminal, on March 24, 1913, and that said train contained fifty-one cars.

c. In the original complaint and on page 2 thereof it is alleged that the deceased was employed as middle or swing brakeman "on one of its (defendant's) through freight trains", but it is not alleged on which train and the failure to give that information necessarily required more time to investigate the matter and find and locate the cars, as will be more fully hereinafter shown.

d. The said original complaint alleged that the "said train was composed of 55 cars", but does not give the number or initials of any of them, and this lack of definiteness necessarily required more time to investigate the facts and prepare the defendant's defense as is fully shown below.

e. The said original complaint after alleging that said 55 cars "were placed irregularly and indiscriminately in the make up of said train" further alleges that the duty of the deceased required him to look after and pass over the tops of the cars comprising the middle section of said train and that his beat or section of said train was composed of about 17 cars located in the center of said train" and also, that at the rear end of deceased's section or beat on said train,

85 there were two box cars or refrigerator cars of about equal height and that immediately in front of these two cars there was a car unusually denominated as an "oil car", but said complaint does not show the initials of numbers of said cars, nor their destination, nor to what system they belonged, which information is essential to the just and preparation of the defendant's defense herein, but on the other hand, the said original complaint alleges: "that the markings and numbers of said cars are unknown to the plaintiff and for that reason he cannot more particularly describe them."

f. The said original complaint complains of defects in two refrigerator or box cars and the grab irons, hand holds or ladders thereof, rather said complaint alleges "that there were no ladders or grab

irons or hand holds on the end of the box car or refrigerator car immediately behind the oil car" without showing whether it was a box car or a refrigerator car which was alleged to have no ladder or grab irons at the end, and without showing whether it is intended to allege that the appliance complained of or the absence of which is complained of was a ladder, a grab iron or a hand hold, and without showing whether it is intended to claim that there should be some one of said appliances or more than one, or whether said appliances should be on the end boards of said car or on the boards on the side thereof, but at the end of said car, and without showing whether said car complained of was in service on or before July 1, 1911, the importance and materiality of which information is fully set out below on account of the indefiniteness and uncertainty of said original complaint the defendant could not properly prepare its defense herein. Because of the allegations as to the absence

86 of end grab irons or hand holds from box cars or refrigerator cars under said original complaint, it became and was necessary for a proper defense thereof to trace the history of each box car and each refrigerator car in said train, as said train contained more than one tank car and numerous box cars, and probably six or seven refrigerator cars of various makes, at the date of the car movement, the date of accident and *the date of accident* and the date of the death is alleged in the complaint as March 26, 1913, and as neither the number or other description of the train is given, it became and was essential under said original complaint to make investigation and preparation to meet the dates alleged in said complaint. The said original complaint was filed and summons issued thereon on May 23, 1913, a copy of said complaint was received in the office of this affiant on May 24, 1913, and on the same day a copy of the same was forwarded to the office of the general solicitor of the company in Kansas City, Missouri, and on the same day a copy of said complaint was forwarded to Mr. W. C. Rochelle, Claim Agent of the defendant, in whose jurisdiction the suit was brought, with request to make a thorough immediate investigation. On May 26, 1913, two days afterwards the affiant was informed that the case belonged to the claim agent of the Northern Division, to-wit: Mr. J. B. Green. The affiant at once telegraphed said Rochelle to forward copy of the complaint to said J. B. Green and received a telegram that same had been done; on same day, May 26, 1913, the General Solicitor of the Company authorized and directed the said Claim Agent, J. B. Green to make an immediate and thorough investigation as to the history of the cars in said train in so far

as they were liable to be involved in this accident. This 87 affiant also took the matter up with the said J. B. Green with a view to expediting the investigation, and by correspondence and personal conference, kept in touch with the progress of the work of investigation. In said original complaint in substance it is alleged as negligence that the ends of the refrigerator cars or box cars had no grab irons or hand holds on the ends of same, under the Act of Congress, known as the Interstate — and the amendments thereto, and under the rules and regulations of the

Inter-state Commerce Commission made in pursuance thereof, it is not required that all cars have ladders and grab irons or hand holds on the end boards of same, but it is only required that cars which were built after July 1, 1911, should have grab irons or ladders on the end boards of said cars, and as to all cars which were in service on and before July 1, 1911, there is no requirement that said cars shall have ladders or hand holds or grab irons until after July 1, 1916 unless said cars have been practically rebuilt. The orders of the Inter-State Commerce Commission on the subject being in part, as follows: "Ladders, number four, location are on each side, not more than eight inches from right end of car; one on each end not more than eight inches from left side of car; measured from inside of edge of ladder stile or clearance of ladder treads to corner of car." The above provision applies to cars constructed since July 1, 1911. As to cars in service on or before July 1, 1911, the Interstate Commerce Commission has provided under and by virtue of the said acts of Congress as follows:

"Carriers are not required to make changes to secure additional end ladder clearance on cars that have 10 or more inches end ladder clearance within 30 inches of side of car until car is
88 shopped for work, amounting to practically rebuilding of body of car, at which time they must make to comply with the standards prescribed in said order. (e) Carriers are granted an extension of five years from July 1, 1911 to change cars having less than 10 inches end ladder clearance within 30 inches of side of car, to comply with the standards prescribed in said order. (f) Carriers are granted an extension of five years from July 1, 1911 to change and apply all other appliances on freight train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to standards prescribed in said order in respect to hand holds, running boards, ladders, sill steps and walk staffs provided, that the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896, and M'ch 2, 1903. (g) Carriers are not required to change the location of hand holds except end hand holds under sills, ladders, sill steps, brake wheels and brake staffs on freight train cars, where the appliances are within three inches of the required location, except that when cars undergo regular repairs, they must then be made to comply with the standards prescribed in said order."

The above orders of the Interstate Commerce Commission have the force and effect of law, and are made under and by virtue of the exclusive power of Congress over the subject of interstate commerce.

By reason of the above requirements which are law, it becomes and is an important inquiry in this cause to learn the history of each car to which are directed the allegations of the complaint and to ascertain whether said cars were in service on July 1, 1911, for if they were in service at that time and have not been practically rebuilt since that date, then as a matter of law there was no duty
owing by the defendant to the deceased to have ladders or

89 hand holds on said cars and in that event it would not be negligence nor evidence of negligence if such cars were without end ladders or hand holds and while the defendant maintains that under the Interstate Commerce Act on which plaintiff bases his right to recover, the burden is upon the plaintiff to prove that said cars and each of them were constructed or reconstructed since July 1, 1911, yet as this court has not decided the question of the burden of proof in such cases, it would not be affording defendant a fair trial as contemplated by law to force into trial and place upon it the burden *or throwing* the true history of each car as above shown the investigation into the history of each car was began immediately upon the bringing of this suit. It was not possible to complete the same so as to take the evidence of the owners of each car, as to show whether same was in service on July 1, 1911, and whether same has been rebuilt. The train contained about 52 cars, two or more tank cars as affiant is informed and believes, at least five or six, if not more, refrigerator cars, and many more box cars.

The defendant has completed the investigation of some of said refrigerator cars, but as neither the amended nor the original complaint definitely locates or describes the exact refrigerator car in controversy, the defendant cannot safely go to trial without the full history of each refrigerator car, as under the allegations of the original complaint, the plaintiff may rest his proof upon any refrigerator or box car and under allegations of amended complaint upon any one of the SFRD Refrigerator Cars in that claim, and hence by

90 reason of the indefiniteness and uncertainty of the plaintiff's complaint, the defendant cannot obtain a fair and impartial trial without sufficient time to investigate the history of each such car and to take depositions of witnesses to show that each refrigerator car which may be included in plaintiff's complaint was in service on July 1, 1911, and has not since that date been practically rebuilt. This full investigation can be made by the next term of this court and the defendant alleges as a fact and believes it to be true, that each of said cars referred to as refrigerator cars in said train, was in service on and before July 1, 1911, and said cars have not been "practically rebuilt since that date, and that each of said cars is not as a matter of fact or law required to have thereon end hand holds or ladders or grab irons.

Defendant further shows that it takes time and considerable amount of time to look up the history of each car for the reason that the books and records of the owners of said car must be fully investigated, so as to ascertain and determine not only whether said car was built but whether same has been "shopped" for rebuilding. The defendant, through its proper agents and officials at once upon receiving a copy of the complaint herein, began an investigation of the matter and has the history of some of said refrigerator cars complete, but whether those are the cars intended by the plaintiff's complaint or proof, the defendant cannot tell, but defendant did not get the history of said cars completed in time to take the depositions of the witnesses to prove the history of said cars, because of plaintiff's failure to name the cars against which his allegations and proof

91 would be directed, defendant did not have time since the receipt of a copy of said complaint to get the facts concerning said cars, and has not said history, although the names of the witnesses by whom the history of said cars can be proven, are not all known, but they can all be located and their depositions taken before the next term of this court. The SFRD Refrigerator Cars, the defendant is advised, and so alleges, are cars belonging to the Atchison Topeka & Santa Fe Railway Co., but this defendant did not know that plaintiff intended to prove that make of cars until the amended complaint was filed and that was on June 30, 1913, being the same day also on which this affiant received a copy of the said amended complaint. The said A. T. & S. F. Ry. Co. is a very large and extensive railway system and this defendant has not had time since June 30, 1913 to even investigate each SFRD refrigerator car in said train, much less has it had time to take the depositions of the witnesses to show that each of said cars which is alleged to be true, was in service on and before July 1, 1911.

This information concerning each of said cars involved can only be obtained by a careful and thorough search through the records of the owners of each refrigerator car, and cannot be safely made by telegraphic correspondence, as a mistake in the initials or number of the car in question would render such investigation useless, and a reasonable time in which to make the necessary investigation as to each car involved would be at least 50 or 60 days, and then time after that to take the depositions. Defendant used all possible diligence, and so doing received on June 30th, from the Santa Fe, word that the cars of the company were in service July 1, 1911, which letter giving the information shows that some of the witnesses by whom to make the proof are in Chicago, Ill. and some at other points on that line.

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II.

For further ground of continuance the defendant states that on June 30, 1913, less than ten days before the opening day of this court and after defendant had filed herein a petition and bond for the removal of this cause to the United States Court, and after the plaintiff and his counsel had been notified of the defendant's purpose to remove this cause, the plaintiff filed an amended and substituted complaint, a copy of which was received by this affiant on the same day, June 30, 1913, and on that day this affiant duly notified counsel for the plaintiff that the defendant could not be ready for trial at this term of the court and that their amended complaint would be urged as one of the grounds for continuance. In said amended and substituted complaint the following new allegations are made, all of which taken together constitute an additional cause of action.

1. It is alleged that the death occurred on March 24, 1913 instead of on March 26, 1913, as in the original complaint.

2. That said train is alleged to contain 51 cars instead of 55, as originally alleged.

3. In the original complaint it is alleged that the two box or re-

frigerator cars which are defective were at the end of deceased's section of the train, whereas in the amended complaint it is alleged that said box or refrigerator cars were "at or near the rear
93 end of deceased's section" thus making it more difficult to locate said cars and to determine to what cars plaintiff will direct his proof.

4. For the first time the amended complaint contained the information that said cars were "marked with the initials SFRD Refrigerator cars but that is still exceedingly indefinite as there are hundreds and probably thousands of cars with those initials. To make a definite allegation as to any car, its number as well as initials must be given.

5. The said amended complaint as to "oil or tank car contained this new allegation, "with a railing about three feet high around the sides of said oil or tank car and the space of the floor between this side railing and the tank constitute the only walk way or passage way provided for brakemen to pass over said oil or tank car."

6. For the first time it is alleged that said tank car did not have any means to enable a brakeman to go from one car to the other (page 3) and also that the absence of said appliance from the tank car "made it necessarily dangerous for the brakeman in going from the refrigerator car to the tank car".

7. Also the following entirely new cause of action: Plaintiff further alleges that there were no grab irons or hand holds on the end of the oil car or tank car, immediately in front of the refrigerator car, or any other appliance thereon to enable brakemen in passing from the rear end car to the oil or tank car to hold and steady himself while making said passage."

8. And for the first time, the following:

94 "Thereupon the deceased got on top of said train on the front end" of the second car * * * which was one of the refrigerator cars, marked with the initials aforesaid."

9. And also the following new cause of action causing deceased's injury "from the negligence of the engineer in manipulating the air of said train or from some other reason, unknown to the plaintiff."

10. And also the following new allegation of negligence (p. 4) making a separate and new cause of action, "and because of the absence of any ladder, hand holds or railing on the end of said oil car or tank car, which would have enabled deceased to hold to while making such passage."

11. After alleging some new matters on page 5, of said amended complaint, the following new ground of recovery is alleged: "He further alleges that the engineer of said defendant was negligent on the occasion of defendant's injury in permitting his air to become out of order or in carelessly manipulating his air in such a manner that said train was caused to jerk violently and unusually, which jerking contributed to the injury of plaintiff's deceased, as aforesaid."

The defendant alleges that the above and foregoing amendments bring into this cause new issues and require new evidence to sup-

port or rebut the same, and this defendant is not prepared to go to trial on said new causes of action, because it cannot prepare its defense to meet the new issues at this term of the court, and it has done all that it possibly could to prepare to meet said new issues, but it has been and is now impossible for defendant to secure its witnesses to meet said new allegations. It has filed its answer, but it did not thereby intend to waive its right to a continuance and has not done so as is shown by its notice to defendant that it could not go to trial on this new complaint. In support of this second ground the defendant alleges that under this new allegation as to the tank car having no proper hand hold or grab iron, it will be necessary under this new complaint to get history of this tank car and to meet the contingencies of plaintiff's proof, it is necessary to obtain the history of each tank car in the train and to obtain evidence to show whether said car was in service on July 1, 1913, and also to obtain a certificate from the Interstate Commerce Commission showing the orders of the said Commission on the subject and defendant alleges that it has not had time since the filing of said amended complaint to take the depositions of witnesses to prove that said tank car was in service on July 1, 1911, but it can be proven by witnesses whose names are at this time unknown but their names can be secured and their depositions taken by the next term of this court.

On July 8, this defendant filed in this court demurrers, motion to require plaintiff to make his complaint more definite and certain, and a motion to strike, which demurrers and motions were intended to require plaintiff to allege and show in his amended complaint to what oil car or tank car or box car or refrigerator car he would direct his proof, and this defendant makes said demurrer and motions a part of this motion and alleges the action of the court in overruling the same makes it impossible for the defendant to get a fair trial herein, without having sufficient time to fully investigate the history especially of said tank car and the name of said tank car is not given, and this affiant does not know the name of the same and does not know the name of any employee of this defendant who does know the name of said tank car, and under the allegations of the amended complaint and since this court has overruled defendant's motion to make said complaint more definite and certain, it is absolutely necessary for a fair trial herein that defendant have time enough to get the complete history of each tank car in said train, so as to be prepared to meet the plaintiff's proof on the subject, for if said car, which ever it was, was in service as defendant alleges it was on and before July 1, 1911, there was no duty on defendant owing to deceased to have on said tank car,—whichever it was,—grab irons and ladders which the amended complaint alleges should be there, and in that event the absence of said hand holds, grab irons or ladders from said car would not be evidence of negligence nor evidence tending to prove negligence on defendant's part, and the allegations as to said tank car was not in the original complaint, and it was

unknown to defendant that plaintiff would rely upon that allegation until June 30, 1913.

97 The witness- referred to by whom to show the history of said cars are not absent by the consent or connivance of this defendant, and said witnesses are not in the jurisdiction of this court and this defendant cannot obtain a fair and impartial trial herein, without the evidence of said witnesses and the certificate of the Inter State Commerce Commission as to said rules, and this defendant has no witness by whom it can make the proof except those above described.

Premises considered, defendant prays that this cause be continued to the next term hereof.

(Signed)

JAMES B. McDONOUGH,
J. R. MORRELL,

Attorneys for Defendant.

I, James B. McDonough, on oath state that I am the attorney for the defendant and have read over the above motion and the matters and things therein stated are true to the best of my knowledge and belief.

(Signed)

JAMES B. McDONOUGH.

Subscribed and sworn to before me this 11 day of June, 1913.

Filed in open court July 11, 1913.

ED JONES, *Clerk.*

98 The court overruled said motion said motion for a continuance, and the defendant at the time excepted to the action of court in overruling said motion for a continuance.

Thereupon the plaintiff announced ready for trial, but the defendant did not announce ready for trial, and the court directed the said cause to proceed, and the defendant saved an exception. This occurred before the jury was empanelled, and on July 10th, 1913.

Upon the trial of this cause, the plaintiff, to maintain the issues on his part, introduced the evidence set forth below. The said evidence, including all testimony herein, was taken down in short hand by Allen Watkins, the official court reporter, and was by him reduced to writing, and a report thereof duly filed by said official court reporter in accordance with law. All of the testimony, including the testimony of the plaintiff and that of the defendant, was so introduced and so taken down and so reduced to writing.

The said defendant, to maintain the issues on its part, introduced the testimony as shown below. The said testimony was so taken down in short hand, and the transcribed notes thereof, of the official court reporter, are set out below, and said report of said official reporter contains all of the evidence introduced herein, and all of the objections made by either party to evidence, and includes all of the evidence offered in testimony and the objections and exceptions on either side, and all rulings of the court as to

99 the evidence, and all objections and exceptions thereto. The said transcribed notes of evidence, being all of the evidence herein, are in words and figures as follows:

100 In the Little River Circuit Court, July Term, 1913.

SAM E. LESLIE, Administrator, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

This cause came up for trial July 11th, 1913, before J. T. Cowling, Judge presiding and jury.

The following attorneys represented the respective sides: For the Plaintiff, W. P. Feazel; for the Defendant, J. B. McDonough.

The jury being empanelled and sworn and both sides announcing ready for trial, the following proceedings were had, to-wit:

Judge FEAZEL: I want to introduce the letters of administration.

Mr. McDONOUGH: I save a formal exception to the Letters of Administration.

The Letter of Administration is here introduced and reads as follows: marked Exhibit "A" to Plaintiff's complaint.

Letters of Administration.

STATE OF ARKANSAS,

County of Howard:

Estate of Leslie A. Old, Deceased.

State of Arkansas to all Persons — Whom these Presents shall Come,
Greeting:

101 Know Ye, that whereas, Leslie A. Old, of the County of Howard and State of Arkansas, died intestate, as it is said, on or about the 26th day of March, 1913, having at the time of his death personal property in this county, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same. To the end therefore that the said property may be collected, reserved and disposed of according to law, we do hereby appoint Sam E. Leslie administrator of all and singular the goods and chattels, rights and credits, which were of the said Leslie A. Old at the time of his death, with full power and authority to dispose of said property according to law and collect all moneys due said deceased, and, in general, do and perform all other acts and things, which are or hereafter may be, required of him by law.

In testimony whereof, I, C. G. Hughes, clerk of the said court in and for the county of Howard aforesaid, have hereunto set my hand and affixed the seal of said court, at my office in Nashville this 21st day of May, 1913.

C. G. HUGHES, *Clerk.*

I, C. G. Hughes, clerk of Howard County, do hereby certify that the foregoing was filed in my office for record, on the 21st day of May, 1913, and the same is now duly recorded.

Witness my hand this 21st day of May, 1913.

[SEAL.] (Signed)

C. G. HUGHES, *Clerk.*

102 Mr. McDONOUGH: I want to object to any testimony on the ground that the cause of action has been removed, and that the complaint does not state a cause of action.

Court overruled the motion of the defendant, to which ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

103

Testimony of Harry Eames.

HARRY EAMES, the first witness called on behalf of the plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Where do you live?

A. Heavener, Oklahoma.

Q. How long have you been living at Heavener?

A. Since September 15th, 1910.

Q. Did you know Leslie A. Old in his lifetime?

A. Yes, sir.

Q. Where did he live at that time—at the time of his death?

A. I couldn't say positively. I wasn't very well acquainted with him.

Q. What business were you engaged in on the 24th day of March last and prior thereto?

A. As conductor on the K. C. S.

Q. Conductor on what?

A. Freight train service.

Q. Where were your runs generally?

A. From De Queen to Watts; De Queen, Arkansas to Watts, Arkansas.

Q. Was De Queen at that time a terminal station?

A. Yes, sir.

Q. Was there any other terminal between De Queen and Watts?

A. Yes, sir.

Q. What was it?

A. Heavener.

104 Q. Heavener was your headquarters?

A. Yes, sir.

Q. Sometimes you would run from De Queen to Heavener and back and then from Heavener to Watts and back?

A. Yes, sir.

Q. How long had you known Leslie A. Old before his death?

A. I couldn't answer that positively. He had been out on the road with me. I think this was his third trip. I couldn't say when he made his first trip.

Q. You remember the occasion of his death, do you?

A. Yes, sir; I remember the night of his death.

Q. Do you remember what night that was?

A. Yes, sir.

Q. What was it?

A. The night of March 24th, 1913.

Q. Where did it occur?

A. Page, Oklahoma.

Q. What was he doing at that time? What business was he engaged in?

A. Braking.

Q. For whom?

A. Kansas City Southern.

Q. What position as brakeman did he occupy? I mean, where did he work? What end?

A. His position on the train?

Q. Yes, sir.

105 A. On this trip he was what is called the swing brakeman, middle brakeman.

Q. You were conductor of that train?

A. Yes, sir.

Q. And he was the middle brakeman?

A. Yes, sir.

Q. Who were the other brakemen if there were any others?

A. R. W. Smith and L. S. Monroe.

Q. Is he the one you called Colonel Monroe?

A. Yes, sir.

Q. Where was that train you gentlemen had charge of that night made up?

A. De Queen, Arkansas.

Q. When?

A. I couldn't say when. It was made up as well as I remember by the yard engine.

Q. What day of the month and what time of the day?

A. Well, that would be pretty hard for me to answer. That engine works you see from one o'clock A. M. to twelve noon.

Q. What time did you leave De Queen with that train?

A. It was in the forenoon sometime.

Q. Can you approximate about the hour that you left there?

A. As near as I could judge it was about 9 o'clock.

Q. In the morning?

A. Yes, sir.

Q. State to the jury who constituted the crew of that train?

106 A. T. J. Clayton, Engineer; Tom Anderson, Fireman, R. W. Smith, head brakeman, L. Olds, Swing brakeman and L. S. Monroe, rear brakeman.

Q. And you the conductor?

A. H. Eames, the conductor.

Q. Where was the destination of that crew of that train?

A. Heavener, Oklahoma.

Q. I understand you to mean by that that when the train got to Heavener why then the crew changed?

A. Yes, sir.

Q. The crew would be released and some other crew would take charge of it if it were going beyond there?

A. Yes, sir.

Q. Do you remember how many cars were in the train?

A. About fifty-three I thin-; that is, when we left De Queen.

When we arrived at Heavener I think there were fifty-one.

Q. What did you do with the balance of them?

A. They were set out.

Q. Where?

A. One at Rich Mountain and one at Howard.

Q. Why did you set them out?

Mr. McDONOUGH: Objected to as not competent, material, relevant.

COURT: No, he is no-suing for that. That might have some bearing on some other matters. Go ahead.

To the ruling of the Court the defendant at the time excepted and asked that *their* exceptions be noted of record, which is done.

107 Q. Why did you set them out?

A. The first one was set out on account of the draw-bar being pulled out and the second one on account of a knuckle being broken.

Mr. McDONOUGH: Those matters, in my judgment, have no bearing whatever in the controversy here.

COURT: I really don't see how they can bear on the allegations in the complaint.

Judge FEAZEL: Very well. Let the question be withdrawn then.

Mr. McDONOUGH: I ask the court to instruct the jury they are not to consider that testimony.

The COURT: They are not to consider that testimony with reference to those cars being set out or why they were set out.

Plaintiff at the time excepted to the ruling of the court and asked that his exceptions be noted of record, which is done.

Q. Did you have any trouble with the air on the train on the trip?

Mr. McDONOUGH: Objected to as not competent or relevant or material.

COURT: Objection overruled.

Defendant at the time excepted and asked that its exceptions be noted of record, which was done.

A. Well, we had no uncommon trouble with the air.

Q. What trouble did you have, if any?

Mr. McDONOUGH: Same objection.

COURT: Overruled.

108 Defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. Well, the air had stuck on one and possibly two occasions on one car.

Q. Do you know where that was?

A. You mean——

Q. Where you were at that time?

Mr. McDONOUGH: Objected to for the further reason it is not shown by Mr. Eames he is familiar with the air and know- about the facts about which he is speaking.

COURT: Overruled.

Defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Q. Do you know where that was?

A. No, sir; I couldn't say positively. I couldn't say where it was exactly that the air stuck. It was before we arrived at Page.

Q. You don't know whether it was more than once or twice?

A. It wasn't over twice.

Q. Now, when you got to Page, did you see Mr. Old?

A. Yes, sir.

Q. Where did you see him?

A. First in the waiting room of the depot.

Q. Who got into the waiting room first?

A. I couldn't say. There were two brakemen in there when I arrived.

Q. What did you stop at Page for?

A. For orders.

109 Q. To get orders for the future controlling of your train?

A. Yes, sir.

Mr. McDONOUGH: Objected to as leading.

COURT: It is immaterial. Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. You went in there to get orders and you found Old and who else in there?

A. R. W. Smith.

Q. He was the Head Brakeman?

A. Yes, sir.

Q. How long did you and they remain in the waiting room?

A. Only a few minutes.

Q. What did you do then?

A. After leaving the waiting room?

Q. Yes?

A. The head brakeman taken the train orders to the engineer but I remained on the platform.

Q. Is it a platform or just a gravelled place there?

A. It is a gravel platform or chert platform.

Q. This is in front of the station house?

A. Yes, sir.

Q. When did the head brakeman leave the station. Before or after you did?

A. We both came out of the door right close together.

Q. When did Olds leave the station, before or after you did?

A. After.

110 Q. How long afterwards?

A. It was just a short while; possibly a minute or maybe three minutes.

Q. What did you when you walked out of the station?

A. I walked south from the station.

Q. Down toward the caboose?

A. Yes, sir.

Q. About how far was the caboose at that time from the door of the station?

A. About twenty-five car lengths.

Q. You walked down toward the caboose from the front end of the station?

A. Yes, sir.

Q. About how far from the front door?

A. Well, I walked to the south end of the platform which is about somewhere seventy or eighty feet possibly less or more.

Q. Isn't it about sixty where you stopped?

Mr. McDONOUGH: Objected to as leading.

Court: Go ahead.

To the ruling of the court the Defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. Well, the first time I stopped was only about half way.

Q. What did you stop for?

A. I don't know just why I stopped.

111 Q. Do you know what you did when you stopped?

A. I just stopped there just for a moment and then proceeded on to the south end.

Q. Did you see Leslie when you got out there?

A. He passed me when I stopped the first time.

Q. Where were you when you stopped the first time with reference to the door?

A. South.

Q. How far from the door?

A. About half the length of the platform that lies south of the depot.

Q. That would be something like thirty or forty feet south then, would it?

A. Yes, sir.

Q. Now Old passed you there?

A. Yes, sir.

Q. What direction was he going?

A. South.

Q. Where did he go after he passed you?

A. He went on towards the rear of the train.

Q. How far did he go?

A. Well, I should judge he went two—

Mr. McDONOUGH: I object to that your honor because he couldn't testify to things he didn't know.

Court: Unless he knows, how far it wouldn't be competent.

A. I don't know exactly how far south.

Q. You saw him pass you and go down there?

112 A. Yes, sir.

Q. What became of him after he passed you and went down that way?

Mr. McDONOUGH: If he knows.

Court: State where you last saw him.

A. That is the last time I saw him to know positively that that was him.

Q. Well, didn't you see somebody climb upon the train down there?

A. I saw a party after they were upon the train.

Q. What did he have?

A. A lantern.

Q. What car was he on?

A. Well, I couldn't say as to the number of it.

Q. I mean coming from the caboose about what car was he on?

A. The number of cars numbering from the caboose?

Q. Yes, sir.

A. Well, I couldn't say exactly what car that was.

Q. Well, give us the benefit of your best judgment?

A. It was about the fifteenth car, fourteenth or fifteenth car.

Q. What was he doing when you saw him?

A. He was on top of the car.

Q. What kind of car was he on top of?

A. A refrigerator car.

Q. Do you know the number of it?

A. No, sir.

Q. Do you know the initials?

113 A. S. F. R. D.

Q. How many of those cars were in that train?

A. I couldn't say positively whether more than two.

Q. What numbers of car were they now counting from the caboose?

A. They must have been about the fourteenth and fifteenth cars.

Q. What was immediately in front of these two S. F. R. D. cars?

A. Oil car or acid tank.

Q. You say that was immediately in front of those two refrigerator cars?

A. Yes, sir.

Q. Now then, on which one of those refrigerator cars was Mr. Old when you saw him last?

A. The second.

Mr. McDONOUGH: I object to that question. The witness has stated the last time he saw Mr. Old to know him was on the ground. He saw a man up there with the lantern but he doesn't know that it was Mr. Old.

Court: That is true.

Plaintiff at the time excepted to the ruling of the court and asked that his exception be noted of record, which is done.

Q. Is it not true, Mr. Eames, that when Mr. Old passed you going down toward the caboose that you thought he was going to the caboose and that you knew that his work required him up there near the center of that train shortly after he left Page and were you not going to hallow at him and tell him to get on top of that train and not go to the caboose?

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Court: I don't think that is competent. He may state what his

duties were. He may testify what the duty of Old was, but as to what he thought and what he was going to tell him, and so forth, is incompetent.

Plaintiff at the time excepted to the ruling of the court and asked that his exceptions be noted of record, which is done.

Q. You know Sam E. Leslie, the plaintiff in this case, don't you?

A. I have met him, yes, sir.

Q. He talked to you about this at Heavener sometime ago, didn't he?

A. Yes, sir.

Q. Didn't you tell Mr. Leslie in that conversation that Mr. Old passed you and you thought he was going to the caboose?

Court: I hold that is incompetent.

Judge FEAZEL: I am just asking him what he told Mr. Leslie.

Court: Go ahead.

Q. In that conversation didn't you tell Mr. Leslie that he would have to work—what do you call, those air things on there?

A. Retainer valves.

Q. Didn't you tell him he would have to work those and after you saw him climb upon the car?

115 Mr. McDONOUGH: I renew the objection.

Court: He may answer if he told Mr. Leslie that.

Mr. McDONOUGH: If it is admissible then it is admissible to ask him if he told Mr. Leslie that. Mr. Leslie is the plaintiff in this case.

Court: He is not offering that as testimony. He is asking him what he told Mr. Leslie.

Mr. McDONOUGH: I save an exception to the ruling of the court.

Judge FEAZEL: Read the question:

Q. Didn't you tell him he would have to work those and after you saw him climb upon the car?

Mr. McDONOUGH: I think that is immaterial, irrelevant and incompetent for several reasons. It doesn't tend to prove any issue here and what he may have said to Mr. Leslie is not competent to prove his case against this defendant.

The Court: Answer the question.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. The best of my remembrance I told Mr. Leslie that L. Old came out of the depot, walked by me on the platform south, and then Mr. Leslie asked me if I saw him board the train, and I said that I didn't remember of seeing him board the train but I said that I saw him after he was on the train but that I couldn't determine whether that was him positively or not, inasmuch as I couldn't see his face. I couldn't determine positively that was any

116 party because I never saw his face and that is the only way I had of recognizing him and that this party was on top of the train and that party was coming north supposed by me to be brakeman Olds.

Mr. McDONOUGH: I move to exclude the last remark.

Court: What he supposed, that is incompetent.

Q. Didn't you see some man with a lantern just after Mr. Old passed you climb upon some car down there?

A. Yes, sir.

Q. Did you see anybody go down the road toward the caboose after you saw this man climb upon the car with the lantern?

A. No, sir, there wasn't any other party that I seen.

Q. No other man after you saw this man south of you climb down the car with the lantern?

A. No, sir.

Q. What became of Old with his lantern if that wasn't Old got upon the train?

Mr. McDONOUGH: That is objected to as incompetent, irrelevant. It is an argument.

Court: If he knows he may answer.

A. I don't know what became of him.

Q. In the ordinary course of business and in the discharge of his duties, Mr. Eames, what would he have done after he passed you?

Mr. McDONOUGH: Objected to as not competent or relevant.

Court: What was his duty to do?

117 Mr. McDONOUGH: That is objected to for the same reason. Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. With reference to getting on the train?

A. His duty on the train?

Q. No, sir, with reference to getting on the train; in other words, was it his duty to get on the train?

Mr. McDONOUGH: Objected to as leading.

Court: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

A. Yes, sir.

Q. Now then, you saw somebody with a lantern whose face you could not see pass you and he was on top of the train?

A. Yes, sir.

Q. You were at that time I believe you state about sixty or seventy feet maybe eighty feet south of the door at the station house?

A. Yes, sir.

Q. What were you doing?

A. I was watching in under the train.

Q. Stooping down?

A. Yes, sir.

Q. Did you look at the main you saw up there with the lantern?

A. I glanced.

118 Q. What was he doing?

still. A. I couldn't say positively if he was walking or standing

Q. Which way was he facing?

A. I couldn't say because I couldn't see and the lantern was hanging about his knees.

Q. For that reason you couldn't see his face?

A. No sir.

Q. He was on, now, what car from the tank car you have just described?

A. The second car behind the tank car.

Q. What part of that car was he on?

A. Near the north end.

Q. Then what would be the distance from where you saw him to the tank car?

A. Well, those cars are about thirty-six feet in length and he was from ten to twelve feet I suppose from the north end. That would be about 48 or 50 feet.

Q. Was the train running?

A. Yes, sir.

Q. When he passed you?

A. Yes, sir.

Q. How fast was it going at that time?

A. Somewhere about five or six miles an hour.

Q. How long did you remain there where you saw him while you were squatting down looking under there?

A. Until the caboose came along. I may have raised up just before the caboose got to me.

119 Q. How fast was the train going when the caboose got to you?

A. About ten miles an hour. Nine or ten miles an hour.

Q. About how far from the caboose, I mean how far were you from the caboose when this man on top of the train with a lantern passed you?

A. About fourteen cars.

Q. Assuming that that was Mr. Leslie Olds on top of that car with a lantern when he passed you where would his duties require him to go from that point?

Mr. McDONOUGH: Object to his assuming a thing that is his duty to prove.

COURT: If that was him the jury understands what the witness said about it.

Mr. McDONOUGH: What right has he to assume a thing in that way when he should go on and prove it.

COURT: Go ahead.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. To work towards the head end of the train.

Q. Then if he had discharged his duties he would have moved north from where you saw him, wouldn't he?

A. Yes, sir.

Mr. McDONOUGH: Objected to for the same reason, and also for the additional reason it is incompetent, immaterial and irrelevant.

COURT: Go ahead.

120 To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Q. And in moving north he would have passed over this tank car you have just described, would he not?

Mr. McDONOUGH: Objected to because immaterial and incompetent and because it assumes a state of facts that it is his duty to prove.

COURT: Overruled.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. Yes, sir.

Q. Now then, after the man on top of the car with the lantern passed you did the train increase or slacken its speed?

A. A steady increase.

Q. Where, after that time, did it slacken its speed, if anywhere?

A. I couldn't say.

Q. How long before it became under full headway?

A. I couldn't say as to that.

Q. Well, you have some judgment about it? You are a trainman, ain't you?

A. Yes, sir; but that is something happening every day the speed of the train increasing and decreasing.

Q. For the reason it happens every day you ought to have some judgment about it. How far would it have to go to get in full head way before it—

121 A. Full headway?

Q. Yes, sir.

A. Possibly a quarter of a mile or a half a mile. It depends altogether on how the engineer works his engine. That is awful hard to answer.

Q. You do know the speed of the train increased after you saw that man pass with his lantern?

A. Yes, sir.

Q. Will you please explain to the jury what the brakeman's duties are when he has to work those retainers, when he has to work them and how?

Mr. McDONOUGH: Objected to as incompetent, irrelevant and immaterial.

COURT: Go ahead.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Mr. McDONOUGH: I want to call the court's attention to the situation. If any of that were admissible at all it would first be necessary to show where it is necessary to work them.

COURT: I understand he wants to know what he means by working those retainers.

A. The retainer valve is located near the brake staff on cars.

Q. Where? on the ends?

A. Some of them is on the side. Do you want to know the purpose for which they are turned up? It is the duty of the brakemen in descending heavy grades to turn the retainer up. The 122 is a handle that turns up. Some of them works in three positions and some in two. This retains the braking pressure in the cylinder, and thus assists the engineer in letting the train down the grade.

Q. Then when you go down grade you turn them up? The brakeman has to turn this retainer up?

A. In descending the grade, yes.

Q. When he gets down the grade, what does he have to do then?

A. Release them by turning the handle down.

Q. Now then, is it down grade or up grade at Page when you come in there? Do you go down grade or up grade?

A. We come down grade into Page.

Q. Well, then from Page going out of Page what was the condition of your track; I mean as to grade?

A. Well, it is up grade out of there for a distance of about two miles.

Q. What do you do when you go up grade after you get to the end of the down grade with the retainers. After you get down the grade what do you do with the retainers?

A. The retainer valves has got to be in what we term running position, handle down, for the engineer cannot release his air.

Q. Now then, you say it was up grade as you went out of Page for a distance of how far?

123 A. Two miles.

Q. Was it necessary to do anything with those retainers?

A. Going up grade they turn them down before we start from Page.

Q. Do you know whether they did that or not in this case?

A. No sir.

Q. The brakemen were required to turn them down?

A. Yes, sir.

Q. Then in the discharge of Mr. Old's duty, if he had discharged it, he would have had to pass over this territory of his beat and begin working these retainers two miles from Page, would he?

A. Yes, sir.

Q. Is it two miles or a mile and a half from Page?

A. Well, there is a large cut and the top of the hill and mile post 353 is the top of the grade and made it right in the neighborhood of two miles where the train was standing.

Q. When did you first miss Mr. Old on that train?

A. Leaving Thomasville.

Q. How far is that from Page?

A. Six miles.

Q. Where were you when you learned of his injury?

A. At Heavener.

Q. You didn't learn what became of him then until you got to Heavener?

A. No sir.

Q. How far is Heavener from Page?

124

A. Seventeen miles.

Cross-examination.

Questions propounded by Mr. McDONOUGH:

Q. What is the grade coming into Page from the south?

A. Down grade.

Q. How long a down grade is that?

A. Twelve miles.

Q. In coming down that grade you would have the retainers turned down?

A. Up.

Q. Turned up?

A. Yes, sir.

Q. And, as you were approaching Page, the brakeman, if he discharged his duties, would turn them down in the event they were going to stop there?

A. They don't necessarily have to be turned down to stop but they have to be turned down before we can start.

Q. At the time the train stopped or while it was standing it was the duty of the brakeman to see that it was turned up?

A. They should be turned down before we attempt to start.

Q. Then, so far as the retainers were concerned they should have been turned down by the brakeman before you started out?

A. Yes, sir.

Q. You had an up grade there for two miles?

A. Near two miles, yes sir.

125

Q. Now, when you finished that up grade what would they do with the retainers?

A. Again turn them up.

Q. And in turning them up they assisted the engineer in controlling the engine?

A. Controlling the speed of the train, yes, sir.

Q. Why?

A. By retaining the braking pressure.

Q. That is the air pressure?

A. Air brake pressure.

Q. You had that train equipped with air brakes?

A. Yes, sir.

Q. And when the retainers are turned up it assists the engineer to control the braking pressure?

A. Yes, sir; when this retainer is turned up it retains the braking pressure in brake cylinder and thus enables the engineer to re-charge his train line air pressure.

Q. Do I understand that to mean that by turning the retainers up it retains or presses air in the cylinder or whatever it is?

A. Yes, sir; it is supposed to if the air brake is in good operation, it is supposed to retain fifteen pounds to the square inch on ordinary cars.

Q. The theory is by turning the retainers up the compressed air is retained in the cylinders.

A. Yes, sir.

Q. That is the reason they are called retainers is because they assist in the retaining of the compressed air.

126 A. Yes, sir.

Q. The air brake works upon the principle of compressed air?

A. Yes, sir.

Q. They use compressed air for the power?

A. Yes, sir.

Q. You compress air and get the braking power from that compressed air?

A. Yes, sir.

Q. Now, when the retainers are turned down though when the engineer operates the brakes the compressed air escapes, doesn't it?

A. Yes, when they are turned down it is the same as if they are not on there. When the handle is down they have no duty at all.

Q. Did you hear a controversy or quarrel or any discussion between Mr. Tucker, the agent, and brakeman, Old?

Judge FRAZEL: We object to that if the Court please. That is not proper cross examination.

COURT: That is true. That is not proper on cross examination.

Mr. McDONOUGH: I think it is, your Honor, in view of the statements, and I save an exception to the ruling of the court.

COURT: Very well. You may introduce it by making him your witness.

Mr. McDONOUGH: I think it is admissible upon this ground: he has gone into the question of brakes. In attending to his duty as brakeman he got into a quarrel showing he wasn't tending to
127 his duty.

COURT: No, that is a defense that has not been brought out at all.

Mr. McDONOUGH: If there is anything to show that he engaged in a controversy that detracted from his duty why—

COURT: I think you had better wait and take it up at the regular time.

Mr. McDONOUGH: I save an exception.

Q. The only light that the conductor or engineer carries with him about the car in the operation is a lantern?

A. The engineer carries a torch sometimes.

Q. I mean the conductor?

A. The conductor has a lantern. Yes sir, that is all.

Q. In going from the station down to the place where you want to get on the train you carried a lantern along with you?

A. Yes, sir, after night.

Q. You saw Mr. Old pass you but did not observe him after he passed you while he was on the ground?

A. No sir.

Q. You didn't see him get on the train?

A. I didn't see him board the train, no sir.

Q. After you saw some one on the train on that second refrigerator car did you keep your eye on that person for sometime?

A. No sir, just a glance. I just glanced at him.

Q. You don't know whether he went forward of backwards or what became of him?

128 A. No sir.

Q. You were asked that if he went forward he would go over the tank car, and you answered yes?

A. If he went far enough.

Q. If he went far enough he would go over it, wouldn't it?

A. Yes, sir.

Q. Then, he would not go over the tank car if he got off the train or fell off the train before he got to the tank car?

A. No sir.

Judge FEAZEL: That is rather argumentative, if the court please.
COURT: Go ahead.

To the ruling of the court plaintiff at the time excepted and asked that his exceptions be noted of record, which is done.

Q. About what car from the caboose does the swing brakeman usually begin his duties?

A. He has no certain part. No particular place to begin on.

Q. He would have been in the discharge of his duties then if he had gotten on nearer to the caboose than he did, if he got on at all? Well, I will ask you this question: wouldn't the swing brakeman by getting on the proper place if he had gotten on that train, say, ten cars from the caboose?

A. Not of that particular train.

Q. You said there wouldn't be any particular place he should get on?

129 A. No sir, not any particular place.

Q. Then, he might get on at most any car and yet discharge his duty?

A. Yes, sir.

Q. He could, if he was prepared, go back towards the caboose for some of those cars and discharge duties that might arise there?

A. Yes sir, if he had gotten on nearer the caboose on this particular train, according to our instruction it would have been necessary for him to turn back towards the head end.

Q. Go back towards the engine?

A. Yes sir.

Q. Then he could have gotten on eight or nine cars from the caboose and walked from there forward?

A. Yes, sir.

Q. He would have been in the discharge of his duty then?

A. Wouldn't particularly have been any duty to perform right there.

Q. There is no rule or duty requiring him to look after a certain section or division of the train, is there, as swing brakeman, to the exclusion of all others?

A. The head brakeman generally takes care of the head end of the train. That is according to the length of the train, and considering the condition of the cars and then the swing brakeman comes

next and after the head man I think the requirement is 75 or 85 per cent of the retainers must be turned up, then the head man drops back and gets his third, why then the swing brakeman comes back and get the rest of them to get the required amount.

Q. You say the head man gets a third and the swing gets what proportion?

A. Enough to make the proper per cent of the retainers turned up on the total train.

Q. If the rear brakeman is busily engaged helping you attend to other duties the head and swing brakeman look after the entire train as to the retainers?

A. Yes, sir.

Q. Was the rear brakeman helping you at this particular time?

A. He was acting as flagman.

Q. They called him there and he couldn't look after anything else?

A. No sir.

Q. Then it was the duty of Olds to look after the retainers from the car where you saw this man on top back to the caboose, was it?

A. No sir.

Q. Whose duty was it to look after those retainers?

A. There wasn't any to be turned up on those cars.

Q. You turned up just such a number of retainers as was necessary on the train?

131 A. On loads. As soon as we had enough loads to furnish that amount of retainers.

Q. Where were the empties?

A. On the rear end.

Q. All of the empties on the rear end?

A. I couldn't say positively as to that.

Redirect examination.

Questions by Judge FEAZEL:

Q. I understand you to say in your examination in chief, Mr. Eames, that Mr. Old with a lantern passed you while you were standing midway from the door at the station house to the south end of the platform?

A. Yes, sir.

Q. He was going towards the caboose?

A. Yes, sir.

Q. Shortly after that you saw some man with a lantern climb upon the top of the train south of you? You said that in your examination in chief, didn't you?

A. I saw someone not yet on the train but they were on the ladder going upon the train. I didn't see anybody board the train but I saw somebody on the side of the car getting upon it.

Q. Get upon the top of the train?

A. Yes, sir.

Q. You saw no other man with a lantern upon that car at all?

132 A. Except the man back on the caboose.

Q. How long was it after Olds left you before you saw this man climb upon the car with a lantern?

A. Very shortly.

Q. A very short time?

A. Yes, sir.

Q. I believe you stated that you left De Queen about nine o'clock in the morning with that train?

A. That was the best of my knowledge.

Q. How long before you left there was the crew called into service?

A. I don't remember exactly. We generally have about an hour and a half call time.

Recross-examination.

Questions by Mr. McDONOUGH:

Q. About how far south of you was this man you saw climbing up, or was he south of you at all?

A. Yes, sir; he was south of me.

Q. How far south of you?

A. Well, I never did notice the distance very close.

Q. Give your best judgment about it?

A. Must have been sixty or eighty feet, something like that; possibly further.

Q. Was he on top of the car just directly after getting on top of the car or was he down on the side of the car when you saw him?

A. He was on the side.

133 Q. How far from the top?

A. Well, I couldn't say exactly, it was dark.

Q. You were unable to tell who that was.

A. No, his lantern was far enough up I could tell he wasn't there on top or down at the bottom. I never looked at him very long. I was looking toward the caboose to see that my flagman got on and noticed this light going up the side of the car.

Q. Was that the same car that you saw the man on as the car passed you, or was it a different car?

A. From the distance down there in the dark I couldn't tell what car he was getting on.

Q. Could you tell what kind of a car that man was getting on?

A. Well, there was quite a bunch of refrigerators all there together.

Q. Was there coal cars there also?

A. There was some coal cars, yes sir.

Q. Were there not ten or twelve refrigerator cars in that train?

A. Yes, sir; something like that.

Q. Was there as many as five, six or seven S. F. R. D. cars?

A. I couldn't say just how many there were of that particular initial.

Q. You couldn't undertake to say how far the car on which you saw this man going up—you couldn't undertake to say how far that car was from the caboose, or could you?

134 A. Well, I will just have to judge from the length if a man would be walking how far he would walk until he passed me while the train was moving.

Q. Without regard to that could you locate the car?

A. No, I couldn't swear as to what particular car he got on.

Q. You didn't examine the car on which you saw the light where it was going up? You didn't examine that car to see what car it was or what kind of car it was?

A. Well, the refrigerator cars is all the high cars there was in that certain part of the train.

Q. In the rear end?

A. No, that certain part; not on that train. There was some oil tanks and coal cars.

Q. How many tank cars were there in the train?

A. I couldn't say.

Q. What would be your estimation?

A. It would be an awfully rough guess. Might have been two or three on the rear end and then one up a little further scattered through the train. There was some on the head end as well as I can remember.

Redirect examination.

Questions by Judge FEAZEL:

Q. Do you know how many coal cars there were in that train?

A. No sir.

Q. There was quite a number, wasn't there?

135 A. There was quite a few, yes.

Q. What do you call the coal car? Tell the jury what a coal car is?

Mr. McDONOUGH: I don't see the relevancy of that if the court please. I object to it.

Court: I don't think you allege any negligence on account of that coal car.

Judge FEAZEL: No, sir, I do not, but I allege negligence on the ground they put low cars next to that oil tank in the making up of that train.

Court: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. How high are the walls of these coal cars?

A. They run from about thirty-six to fifty inches.

Q. They are these open tops?

A. Yes, sir; without any tops.

Q. They are called Gondola cars, aren't they?

A. Yes, sir.

Q. You say there was quite a number of them in the train?

A. Yes, sir.

Q. As a general rule where does the end of the coal car go up, I mean the end of the wall?

A. The end wall?

Q. In other words, is there not a sill projection at the bottom of the coal car generally?

136 Mr. McDONOUGH: I make objection to that as well as the other and move to exclude it on the ground there is no allegation in the complaint that a coal car should have been placed there and there is no allegation that it would have been safer to place a coal car there.

Court: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

A. On some of them there are; others there is not.

Q. Then on those that have no end sill projection, what provision, if any, is made for the brakeman to stand on in going from one to the other?

Mr. McDONOUGH: Same objection to that as not material or irrelevant and no allegation authorizing it.

Court: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. In other words, do they generally have grab irons or hand holds on the ends of the coal cars?

A. Just the same as box cars, only not as many of them.

Mr. McDONOUGH: Same objection.

Court: Go ahead.

Defendant at the time excepted to the ruling of the court, and asked that its exceptions be noted of record, which is done.

Q. Where are they generally located? on the end?

137 A. Some of them are on the side and some of them on the end.

Q. I am talking about the end ones. Where are the end ones generally located?

A. Right on the corner of the car.

Q. How far from the bottom sill?

A. Well, the bottom one is on the bottom sill.

Q. Where is the next one above that?

A. I don't know what the regular distance is between them. Something like eighteen inches.

Q. Then where is the next one above that?

A. About the same distance above it.

Q. How many, as a rule is on the end of the coal car?

A. Would be according to the height of the car.

Q. Well, if the car was thirty-six inches high how many would there be?

A. Two; maybe three.

Q. If it was forty-three inches about how many would there be?

A. Would be about five.

Q. Do you know who signalled that train out of Page that night?

A. When the head brakeman handed the engineer the orders he sounded the whistle and I gave him a proceed signal.

Q. Proceed signal? What is that?

A. Sign to go forward.

138 Q. Where were you?

A. Standing on the platform.

Q. Is there any other signal necessary?

A. No sir.

Q. No highball signal?

A. Well, proceed signal is the proper name for highball.

Q. Did you see the man on top of the train and give any signal?

A. No sir.

Recross-examination.

Questions by Mr. McDONOUGH:

Q. Mr. Eames, you gave a proceed signal, then the train started off at about what distance? three or four miles an hour?

A. No, it didn't start off three or four miles an hour.

Q. But it just moved off gradually?

A. Moved off gradually and gradually increased.

Q. Now, when you got on the caboose, didn't you then give what is called a highball signal, which means you are all on and he can go ahead?

A. Yes, sir.

Q. Where was the caboose at the time you gave that signal?

A. I don't remember. Why, I gave that just before I got on or
139 A. I believe I gave it that night just before I stepped on if I see he is not going at too high a rate of speed to get on safely.

Q. Give your best recollection, if you remember?

139 A. I believe I gave it that night just before I stepped on the caboose.

Q. This refrigerator car, the one second from the tank car, was fourteen or fifteen cars, or was it fifteen or sixteen cars ahead of the caboose?

A. As near as I can remember it was about fourteen.

Q. And each car is about what length on the average, those cars like you had there?

A. There is quite a difference in the length of them. They run from thirty-four to forty feet, those cars.

Q. About how much space would that car take up on that train, say on the average?

A. About thirty-nine to forty feet.

Q. Are not the refrigerator cars longer than the others?

A. Well, they vary in length the same as the others. Some of them are as short as thirty-two feet, and then the coupler takes up a space of twelve to eight inches each end.

Q. Now, from the half way point between any two cars to the half way point between the next two cars is what distance on the average?

A. I understand from that you mean from the center of one car to the center of another?

Q. Yes, sir.

A. Well, that would run on the average of close to forty feet.

140 Redirect examination.

Questions by JUDGE FEAZEL:

Q. Did you give this proceed signal before or after Leslie passed you there on the platform?

A. The first one?

Q. Yes?

A. I couldn't say, I may have given it just as he passed me. I don't know just exactly when I did give it.

Q. What is your best recollection about it?

A. Well, I couldn't say. He might have been walking right by me. I may have given it before he came out of the depot.

Q. Was the train moving when he walked by you going south?

A. Yes, sir.

Q. The train was moving at that time?

A. Yes, sir; the train was just starting.

Witness Excused.

141 *Testimony of L. S. Monroe.*

L. S. MONROE, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Monroe, where do you live?

A. Heavener, Oklahoma.

Q. What is your business or avocation in life?

A. Brakeman.

Q. How long have you been brakeman?

A. I have been braking for the Kansas City Southern twenty-nine months.

Q. Did you ever have any experience as a brakeman before then?

A. No sir.

Q. Did you know Leslie Olds in his life time?

A. Yes, sir.

Q. How long had you known him?

A. I should judge about six months.

Q. Do you remember the night he was killed at Page?

A. Yes, sir.

Q. What was he doing prior to his death? What kind of work was he doing?

A. Braking.

Q. What position did he occupy with relation to the train that is supposed to have killed him?

A. He was swing man on the train.

Q. Where did that train start from?

142 A. De Queen, Arkansas.

Q. About what time did it leave there?

- A. It was in the forenoon something after eleven o'clock.
- Q. Who constituted the crew?
- A. Conductor Harry Eames, Leslie Old, Mr. Smith, and myself were the train crew; T. J. Clayton and Tom Anderson, firemen.
- Q. That was all the laborers on that train?
- A. Yes, sir.
- Q. Where was your destination, the crew's?
- A. Heavener, Oklahoma.
- Q. Did you stop at Heavener that night?
- A. Yes, sir.
- Q. What time did you get there?
- A. The exact time I couldn't tell you, but it must have been about nine o'clock. Something after nine o'clock. Between nine and ten.
- Q. Your position you say was rear brakeman?
- A. Yes, sir.
- Q. Your duties required you to remain where?
- A. On a hill like it was there at Page my duties required me to stay on the rear end.
- Q. That is, the caboose?
- A. Yes, sir.
- Q. Did you leave that place that night?
- A. Page?
- 143 Q. No.
- A. Heavener?
- Q. No, the caboose. Did you leave there that night?
- A. No sir.
- Q. You stayed on the caboose all the time?
- A. I stayed by the side of the caboose at Page.
- Q. How long were you there?
- A. I should judge we stopped there ten or fifteen minutes.
- Q. Where was Old's place of work on that train?
- A. It was between the caboose and engine.
- Q. Who was head brakeman?
- A. Smith.
- Q. Where was his place of work?
- A. His place of duty was on the head end and to work back toward the rear end of the train. And Old's duty was the beginning of the caboose and work to where you met Smith or where Smith left off.
- A. Yes, sir; he was supposed to work until he met the head brakeman.
- Q. Did you see any signals given for that train to pull out that night?
- A. Yes, sir.
- Q. By whom?
- A. I couldn't say as to that positively as I was some twelve or fourteen cars away from the depot when the signals were given.
- 144 Q. Where was the man standing who gave the signal?
- A. The first signal given was on the platform of the depot.

- Q. What signal was that? .
A. Highball.
Q. Did you see another signal given?
A. Yes, sir.
Q. Where?
A. From the center of the train or from the head of the caboose.
Q. How far from the caboose?
A. I should judge twelve or fourteen cars.
Q. Well, where was the person standing who gave that signal?
A. Standing on the top of a high car.
Q. What signal was that?
A. Highball to the engineer.
Q. What does that mean?
A. To proceed.
Q. What does the one you saw given on the ground mean?
A. That means proceed.
Q. Why were two signals to proceed given?
A. Well, the first one was given from the platform and the second one was given after we picked up the conductor after he got to the caboose. I gave the highball myself.
Q. How long had the man that gave the signal from the top of the car been there before he gave the signal?
A. A very short while. He had just got up there.
Q. You saw him climb up?
A. No sir.
Q. You saw him after he got up there?
A. Yes, sir.
Q. That is the first appearance of his light that you saw after it got on top of the train?
A. Yes, sir.
Q. That was the last signal given, was it?
A. Yes, sir.
Q. Then, where was Mr. Eames at the time that signal was given?
A. He was on the rear platform of the caboose, I think. I don't want to be positive.
Q. Where were you?
A. On top of the caboose.
Q. How long had you watched the light that gave that last signal?
A. Just a moment.
Q. Do you know what became of it?
A. No sir.
Q. Did you see it after that?
A. It was moving but I couldn't say as to which way.
Q. When the last signal was given how was the train going?
A. In what rate if it was moving at all?
A. I should judge four or five miles an hour.
Q. These brakemen are required to give these signals, are they not?

146 A. Yes, sir.

Q. Now then, in the discharge of the duty of the brakeman what brakeman would have given the last signal that you saw?

Mr. McDONOUGH: Objected to, if the Court please, because not competent or relevant, and because it calls for a conclusion.

Court: Overruled.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Q. Whose duty would it have been?

A. After the men is on top of the train the last man giving a signal is supposed to be the head brakeman.

Q. I am not talking about that. I am asking you whose duty it was to be at the place you saw this signal given from, the head or swing brakeman?

A. The swing brakeman.

Q. Then it was the swing brakeman's duty to be at the place where you saw this last signal given?

A. Yes, sir.

Q. Mr. Old was the swing brakeman on that train?

A. Yes, sir.

Q. Mr. Monroe, you had some trouble with your air going up on that trip that day, didn't you?

A. The brake sticking was all, yes sir.

Mr. McDONOUGH: Objected to as incompetent and irrelevant.

Court: Overruled. The stenographer may note your exceptions to any ruling I make without calling the Court's attention to it at all. Either side may let their exceptions be noted. The stenographer will note them without being directed.

To the Court's Overruling defendant's objection, the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Q. What do you mean by the brake sticking?

A. The brake sticking in the train is what is called a piston. It is underneath the car. It is in one end of the reservoir and when the engineer applies his air through the brake valve on the engine some brakes won't release as quick as others.

Q. What effect does that have on the movement of the train?

Mr. McDONOUGH: Objected to as incompetent, irrelevant and not properly qualified.

Court: Overruled.

To the ruling of the Court, the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. It drags heavy on the train.

Q. Does it create a jerking or lurching of some kind?

Mr. McDONOUGH: Objected to as leading.

Court: Go ahead.

Defendant excepted to the ruling of the court.

A. No sir.

Q. How many times did you have trouble going up that day?

148 A. Once.

Q. Do you know where it was?

A. Yes, sir.

Q. Where?

A. Leaving Mena.

Q. Is that the only trouble you had with it that day?

A. Yes, sir.

Q. Now Mr. Monroe, what caused this piston to come out, if you know?

Mr. McDONOUGH: I want to object to that because of its indefiniteness and uncertainty, and not shown to apply to any particular car in the train.

COURT: Go ahead.

To the ruling of the court defendant excepted.

Q. What makes that piston come out that you spoke of just now?

A. There is different things. If you cut your train line into like cutting a road crossing it will leak on it.

Q. And that causes the piston to come out?

A. Yes, sir.

Q. What do you trainmen mean when you say a dynamite in connection with the air.

A. A dynamiter?

Q. Yes, sir.

A. My understanding and past experience is that a dynamiter is when the air is first applied sometimes won't set and when it does go on it will go on all at once.

149 Q. That creates what?

A. That creates what is known with us as a dynamiter.

Q. Does the effect of that cause a lurching or jerking of the train?

A. Yes sir, it is liable to tear your train into right there.

Q. Where did you miss Mr. Old's after you left Page?

A. The first place that we thought we missed him was at Thom-

asville.

Q. Where did you first find out he was killed or what became of him?

A. We found out he was killed when we got into Heavener.

Q. What time did you get to Heavener?

A. It was something after nine o'clock.

Q. I believe you stated you left Page at nine thirty, didn't you, or did you not? What did you say about that? Or, was it somebody else said that?

A. I don't think that was me.

Q. What was your recollection of the time you left Page?

A. As near as I can remember, not to be positive, it was about eight thirty?

Q. What time did you get to Heavener? 9:30?

A. It was something after nine.

Q. And that was the first time you knew of what had become of Mr. Old.

A. Yes, sir.

150 Q. You had missed him before that time?

A. I was almost confident that he wasn't on the train.

Q. Do you know how old he was?

A. No sir.

Q. What build was he?

A. He was a large man, I should judge six feet tall.

Q. What was his condition physically, that is stout?

A. He was a strong man.

Q. Was he pretty active or not?

A. Yes, sir.

Q. He was regarded as a young man, was he not?

A. He was.

Cross-examination.

Questions propounded by Mr. McDONOUGH:

Q. Mr. Monroe, I didn't understand the trouble that you said you had at Mena.

A. About the air sticking?

Q. Yes, did you say you had some air sticking leaving Mena?

A. We had one car there that was sticking.

Q. Did you put that car out?

A. No sir.

Q. Did you put it out at Rich Mountain or do you know as to that?

A. I wouldn't be positive whether we did or not.

Q. You did put out a car at Rich Mountain?

A. Yes, sir.

151 A. Yes, sir.

Q. Mena is how far from Page?

A. Twenty-two miles.

Q. From Mena it is up-grade to Rich Mountain?

A. Yes, sir.

Q. And somewhat down-grade from Rich Mountain to Page, is it not?

A. Yes, sir.

Q. You didn't go up to the station at Page?

A. No sir.

Q. You remained down at your place of duty at the rear end of the train?

A. Yes, sir.

Q. The train stopped there for a few minutes?

A. Yes, sir.

Q. About how long, did you say if you said? I don't know whether you did or not?

A. It was between ten and fifteen minutes.

Q. During that time approximately how far was the caboose from the station?

A. Must have been fourteen car lengths.

Q. Approximately then one-third the length of your train, and probably a little less than one-third.

A. A little less than one-third, yes sir.

Q. It was dark, wasn't it? It was after night?

A. Yes, sir.

152 Q. You couldn't recognize any of the men from where you were standing?

A. I could not.

Q. That is, any of the men at the station?

A. No sir.

Q. You could only see their lights?

A. Yes, sir.

Q. From where you were standing, you couldn't see the man on top of the car, could only see his light?

A. That was all.

Q. I believe I understood you to say you didn't see him climb upon the car?

A. No sir, I did not.

Q. Did you observe anyone coming down towards your end of the train a short time before that other than the conductor?

A. I did not.

Q. You saw Eames come down there?

A. Yes, sir.

Q. That is you saw him when he got there?

A. Yes, sir.

Q. Did you see his lantern as it came down from the station?

A. Yes, sir.

Q. After he had gotten up to where you were you were then able to recognize him as conductor Eames?

A. Yes, sir.

153 Judge FEAZEL: If the court please that is very leading.

Court: That is cross examination.

Judge FEAZEL: I didn't ask anything about conductor Eames.

Court: Go ahead.

Plaintiff excepted to the ruling of the Court.

Q. You didn't see any light coming toward you a short time before conductor Eames came down there?

A. I did not to the best of my recollection.

Redirect examination.

Questions by Judge FEAZEL:

Q. Now, Mr. Monroe, how many lights did you see upon the platform after these parties is supposed to have come out of the station house?

A. I only noticed two.

Q. What became of them? Did you see what became of those lights?

A. Yes, sir.

Q. What went with them?

A. After the train was in motion one of them came towards the caboose and I didn't see the other one on the platform but then on top of the train.

Q. You didn't see how it got from the platform to the top of the train?

A. No sir.

Q. Do the brakemen and the conductors have the same colored lights?

154 A. Yes, sir.

Q. No difference in the appearance of them at all?

A. No sir.

Q. And you saw this signal from the top of the car just about the time, or was it about the time that the conductor got on the steps of the caboose?

A. Yes, sir.

Q. The train didn't stop or slaken up after that?

A. No sir.

Q. Did the speed increase?

A. Yes, sir.

Recross-examination.

Questions by Mr. McDONOUGH:

Q. Mr. Monroe, you say, as I understand you, that you saw two lights at the station?

A. Yes, sir.

Q. Did you have any personal knowledge that the head brakeman was there?

A. I did not.

Q. You couldn't tell whether one of the lights which you saw there was the light of the same man that was on the platform that was on top?

A. No sir, I couldn't say.

Q. There was no way of telling the light down at the station was the same light on top?

A. No sir.

155 Q. And from that light you couldn't tell whether that actually was given by the head brakeman or the swing brakeman?

A. No sir.

Witness excused.

156

Testimony of C. W. Black.

C. W. BLACK, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. What is your name, please?

A. Charles Black.

Q. Where do you live, Mr. Black?

A. Heavener, Oklahoma.

Q. How long have you been there?

A. About three years.

Q. What is the nature of your business or avocation?

A. Foreman of the car department.

Q. Od what?

A. Of the K. C. S. Railway Company.

Q. Did you know Leslie Old in his life time?

A. No sir.

Q. You remember the occasion of his death, do you?

A. Yes, sir.

Q. At Page?

A. Yes, sir.

Q. Do you remember when that was?

A. I think it was March 24th if I remember right.

Q. This past March?

A. Yes, sir.

Q. How did you learn of his death?

A. Why I was called down to inspect the train.

Q. Who called you?

157 A. I was called by 'phone by some of the officials of the Kansas City Southern at the office.

Q. Some of the officials of the Kansas City Southern called you to inspect the train? What train?

Mr. McDONOUGH: You mean the officials or some of the employees?

A. Some of the officials at the depot.

Q. Do you know who it was?

A. No, I couldn't say.

Q. Who has charge or control of those employees?

A. Mr. Burkes, the agent and Mr. Stuart is the general dispatcher and Mr. Hill is the train master.

Q. Under whose orders did you work? Who has supervision over you?

A. Mr. Riley is the district foreman. I am under him.

Q. Where does he live?

A. At Heavener, Oklahoma.

Q. Now, under his authority and order you do whatever he wants done?

A. Yes, sir.

Q. Then you were called on by some one in authority to make an inspection of this train?

A. Yes, sir.

Q. When were you called upon, before the train reached there or afterwards?

A. I couldn't say whether the train had arrived or not.

Q. When did you first find the train? How long after you received the orders before you proceeded to discharge your duties?

158 A. I should judge it would take me about fifteen minutes to get down there.

Q. Where did you find it? In the yards?

A. Yes, sir.

Q. Had it just come in, or not?

A. The engine was cut off of it.

Q. What would that indicate?

Mr. McDONOUGH: That is objected to as leading and calling for a conclusion.

Court: If he knows of anything that indicated.

To the ruling of the court, the defendant at the time excepted, and asked that its exceptions be noted of record, which is done.

A. That it had been there as much as ten minutes.

Q. Now, did you make an inspection of that train?

A. Yes, sir.

Q. That is the train that killed Mr. Old?

A. Yes, sir.

Q. Harry Eames was conductor of that train, was he not?

A. I couldn't say.

Q. Did you know any of the employees on that train?

A. Yes, sir.

Q. Who were they?

A. You mean on the train?

Q. Yes, that brought that train in there?

A. Why, I don't know only by what was told me.

Q. You didn't see any of them?

159 A. I didn't see any of them. Not around the train.

Q. You did make an inspection of that train?

A. Yes, sir.

Q. Who assisted you?

A. J. T. Monroe.

Q. Anybody else?

A. No sir.

Q. Did you see any of the train crew there? Anybody there who claimed to be the train crew?

A. No, not while I was there.

Q. That was the night of the 24th?

A. As well as I remember it was the 24th.

Q. Was it reported to you where the man was killed?

Mr. McDONOUGH: That is objected to as leading.

Court: Overruled defendant's objections, to which ruling of the court defendant excepted.

A. Yes, sir.

Q. Where?

A. Page, Oklahoma.

Q. Then, if you didn't know what train was supposed to have killed him how did you know what train to investigate?

Mr. McDONOUGH: That is objected to.

Court: Go ahead.

Defendant excepted to the ruling of the court.

A. I was told.

Q. By whom?

160 A. Whoever called me over the 'phone.

Q. Don't you know who it was?

A. No sir, it was somebody in the office down there.

Q. What office?

A. At the depot at Heavener, Oklahoma. I could tell who generally called me if necessary.

Q. Who generally called you?

A. I was called by the yard clerk.

Mr. McDONOUGH: That is objected to as incompetent, irrelevant and immaterial

COURT: Go ahead.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Q. Who generally called you?

A. Yard clerk, trainmaster dispatcher.

Q. Whoever did call you told you of the train to investigate?

A. Yes, sir.

Q. What did they tell you to investigate for?

Mr. McDONOUGH: Objected to as incompetent, immaterial and irrelevant, and hearsay.

COURT: Go ahead.

A. To inspect the train.

Q. For what purpose?

Mr. McDONOUGH: Objected to for the same reason.

Court overruled defendant's objections and defendant saved its exceptions.

161 A. To see if there were any defects.

Q. Did you investigate it?

A. Yes, sir.

Q. What part of the train did you investigate?

A. The whole train.

Q. Did you find any tank cars in that train?

A. Yes, sir.

Q. How many?

A. Three.

Q. Where were they?

A. Two next to the caboose, the first and second car the head of the caboose, and if I remember right there was one about the seventeenth car.

Q. From the caboose?

A. From the caboose.

Q. What was immediately behind that tank car that you found seventeen cars from the caboose?

A. Refrigerator.

Q. What initials and numbers, if you remember?

A. I remember it was S. F. R. D. but I don't remember the number.

Q. Do you remember the number of the tank car that was next to that?

A. Yes, sir.

Q. What was that?

A. Seventeen.

Q. What initial?

162 A. N. Z. C. Company.

Q. Did you investigate those two cars?

A. Yes, sir.

Q. I mean the box car immediately in the rear of the tank or oil car?

A. Yes, sir.

Q. What did you find now, in your examination of the box car immediately to the rear of the tank car with reference to hand holds?

Mr. McDONOUGH: Objected to as leading, immaterial and incompetent.

COURT: Go ahead.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. I examined the car and found nothing wrong with the hand holds.

Q. How many did you find?

Mr. McDONOUGH: Objected to.

COURT: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. How many hand holds on the end of the car did you find, the box car?

A. There was two.

Q. Where were they?

A. About eighteen inches above the bottom of the car, one on each corner.

Q. What are they for?

163 Mr. McDONOUGH: Objected to as incompetent, irrelevant and immaterial.

COURT: Go ahead.

To the ruling of the court the defendant excepted.

A. For use in coupling trains and holding to.

Q. How about using them as a foot rest in passing from one car to another?

A. They could be used for a foot rest.

Q. Can they be used for that purpose.

A. They could be but I have never seen anybody that I know of.

Q. You say there was one of these hand holds on each end? I mean on each corner of the end of the car next to the tank car?

A. Yes, sir.

Q. About eighteen inches from the bottom of the car, is that right?

A. Yes, sir.

Q. There was nothing above those hand holds for the brakeman to hold to while passing from the refrigerator car to the tank car, was there, on the end of the car?

Mr. McDONOUGH: Objected to. I submit the proper way is to ask for the description.

COURT: That is rather leading. Go ahead and answer the question.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

164 Q. State whether there were any other hand holds on the end of that car?

A. No others.

Q. What provision, if any, was made to assist the brakeman in getting from the top of the box car onto and over the oil car?

Mr. McDONOUGH: Objected to as not competent, relevant or material.

COURT: Overruled.

Defendant saved exceptions to the ruling of the court.

A. Why he comes down the side ladder and steps from the side ladder to the tank.

Q. You mean to the floor of the tank?

A. Yes, sir.

Q. Now describe to the jury the location and manner, the inspection of the side ladder that you spoke of?

A. Well, there is—we call them grab irons. There is one on the roof and one right below the e-ve of the car and about fourteen inches until you get down to the bottom of the car.

Q. How long are those things?

A. Sixteen and eighteen inches.

Q. Are they perpendicular or horizontal to the car.

A. Horizontal.

Q. What projection, if any, was on the tank car, to assist the brakeman from getting from one car to the other?

A. There is a hand rail on the outer edge of the car.

Q. And on the sides?

165 A. Yes. - No rail across the end.

Q. How high was that hand rail from the floor of the car?

A. About three feet.

Q. How close did it come to the end of the platform of the car, the floor of the car?

A. About twelve or fourteen inches.

Q. Wasn't it fourteen? Didn't you measure it now?

A. No, I never measured it.

Q. You gave your deposition up there at Heavener, didn't you?

A. Yes, sir.

Q. Didn't you put it fourteen inches in that deposition?

A. I don't remember exactly whether I did or not.

Q. That is just your judgment, twelve or fourteen inches?

A. Yes, sir.

Q. How far would that put the end of that side railing that the brakeman would have to catch to as he went over from the side ladder or grab irons on the side of the car that he would have to hold to with his other hand on an ordinary car?

Mr. McDONOUGH: No, I object to the ordinary car.

COURT: On that car.

Q. Well, on that car.

A. I don't understand just what you want to get at?

Q. I want to know how far it is from the grab irons on the box car that the brakeman holds to before he makes his step——

A. You mean before he gets a foot rest or a hand hold?

Q. No, the hand hold.

COURT: To the end of that iron.

166 A. About forty inches, might be a little further. Right close to that; might be forty-five.

Q. Forty or forty-five inches.

A. Yes, sir; a little better than three feet I should judge.

Q. Now then Mr. Black, were there any grab irons or anything except the end of this railing that you spoke of on that car for the brakeman to catch to?

A. There was the usual grab irons on the end sill.

Q. That was down below the top of the floor?

A. Yes, sir.

Q. There was nothing above the top of the floor?

A. Nothing until you get to the hand rail.

Q. That was three feet from the top of the floor, was it?

A. Well, you understand, there is as the end of the hand rail a post comes from the floor up to the hand rail.

Q. Does the end of the hand rail stop at the post or does it come this side?

A. Well, I don't remember this one, but as a rule about an inch or an inch and a half comes through the post and extends generally about an inch or an inch and a half.

Q. Do you remember whether that condition obtained on this car or not?

A. No, I couldn't say. The hand rail had to come to the post before it could be fastened.

Q. How near is that hand rail to the outer edge of the car, the floor of the car I mean?

COURT: You mean on the side?

167 Judge FEAZEL: Yes sir, on the tank car?

COURT: You mean on the side or end?

Judge FEAZEL: Side.

Q. How far is that from the edge of the side of the car?

A. The hand rail would be directly over the outer edge of the car.

Q. Where is any walkway provided there for the brakeman to walk in passing over that car?

A. Between the hand railing and tank.

Q. What constitutes that passageway; the floor of the car?

A. Yes sir, the floor of the car there to walk on.

Q. The floor of the car intervening between the hand rail and the tank is the only walkway the brakeman had to get over the tank car, is it?

A. Yes, sir.

Q. How much below the top of that refrigerator car was the walkway of this tank car?

A. About seven feet I should judge from the head of one car to the other.

Q. Most any man can stand up in a refrigerator car, can't he?

A. Yes, sir.

Q. How thick is the roof above him?

A. About six inches from the inside to the outside; six and eight inches.

Q. Well, wouldn't that make the top of the refrigerator car more than seven feet you think?

A. Well, yes, a fellow can stand on the—I was just going by—I am five feet and five. Yes, it is a little further than that.

168 I am five feet, five and as a rule I can stand on a tank car and reach the top edge of the ordinary car, or roof in other words.

Q. Who did you say assisted you in the inspection of this car?

A. F. T. Monroe.

Q. What position does he hold?

A. Night inspector.

Q. Isn't the agent up there Mr. Burrows, or what is his name: Burch?

A. Burch.

Q. Didn't he assist you also?

A. Not in my presence.

Q. You examined all those cars, did you not?

A. Yes, sir.

Q. How many cars were in that train?

A. I couldn't say exactly. I think it was a train of fifty cars, or about fifty.

Q. Wasn't there a number of coal cars in there or Gondola cars?

A. Yes, sir.

Q. About how many?

A. I couldn't say as to that. It was a train made up of tanks, coal cars, box cars, refrigerator cars and dumps.

Q. When the conductor gets into any terminal station it is his duty to make to you what is called a wheel report, is it not?

A. No, they don't make any wheel report to our department.

169 Q. Who do they make it to?

A. I suppose to the transportation department.

Q. Isn't there a wheel report made at every terminal station?

- A. I suppose there is. I hear them talk about it.
 Q. Don't you have anything to do with that at all?
 A. No sir.
 Q. What kind of reports are made to you, if any?
 A. There is none made to us unless something unusual like a draw bar out or a car running hot or something like that.
 Q. Who at Heavener keeps what is called the wheel report? What is his name?
 A. Why, I should think it was the train master keeps a wheel report.
 Q. Well, what is his name?
 A. Hill.

Cross examination.

Questions by Mr. McDONOUGH:

Mr. McDONOUGH: I waive the cross examination on account of your Honor's ruling that the cross examination is so close to my defense I had rather wait and examine him myself on those matters.

Court: All right, call your next.

Witness Excused.

170

Testimony of A. C. Holt.

A. C. HOLT, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

- Q. Where do you live, Mr. Holt?
 A. Page, Oklahoma.
 Q. How long have you been living at Page?
 A. About four years.
 Q. What are you doing there?
 A. I have charge of the mercantile department of the commissary of the Shaw-Black Lumber Company.
 Q. Did you know Leslie Old in his life time?
 A. I had seen him. I knew him when I seen him. I had several years ago.
 Q. You knew him then several years ago?
 A. Yes, sir.
 Q. Do you remember the night he was killed at Page?
 A. Yes, sir.
 Q. Do you remember the day of the month that was?
 A. No sir, I do not. I remember the circumstances.
 Q. Did you see him that night after he was hurt and before he died?
 A. Yes, sir.
 Q. Where did you see him?
 A. When I first saw him he was lying between the rails of the Kansas City Southern.
 Q. How far from the point opposite the door of the station house? How far north, if it was north?

A. Ninety-five yards.

Q. Did you step it?

A. I counted the rails and estimated it from that.

Q. You know it was ninety-five yards?

A. Yes, sir; that won't miss it three feet.

Q. About what time of night did you find him, Mr. Holt?

A. Must have been about 8:35 when I found him.

Q. How was he lying between the rails when you found him?

A. You mean the direction?

Q. Yes, of his person?

A. Well, his feet was towards Heavener, north, and his head was back towards the station.

Q. What condition was his body in?

A. You mean what condition was he lying in?

Q. No, as to injury, the wounds and things of that kind?

A. Why, his left shoulder here seemed to be crushed or mashed in, both legs was cut off below his knee.

Q. How far below his knee? About how far?

A. I couldn't state. They were cut off somewhere between his knee and feet.

Q. What other wounds, if any, did you find?

A. He had a skinned place on the back of his head, and his left hand was mashed, seemed to be two cut places mashed.

Q. Were the bones of the left hand crushed, that you know of?

A. I couldn't state.

Q. How deep was the cut on his left hand?

A. The cut on his left hand wasn't cut very deep. It seemed to be mashed.

172 Q. Did you discover a lantern on the track that night?

A. Yes sir, there was a lantern lying there.

Q. Where was the lantern with reference to where he was lying?

A. I suppose sixteen or eighteen feet from where he was.

Q. In what direction from him?

A. Back towards the depot.

Q. Did you discover any broke-glass around that lantern?

A. Yes sir, the globe there was broken.

Q. The globe to the lantern was broke?

A. Yes, sir.

Q. Where was the globe lying?

A. Right at the lantern.

Q. Did you discover any glass anywhere else except at the point where you found the lantern?

A. No sir.

Q. Did you discover any blood or any evidence of injury between the lantern and where you found the injured man?

A. Yes, sir.

Q. Where and how far from the lantern?

A. I suppose seven or eight feet, something like that.

Q. Seven or eight feet north of the lantern you discovered the first blood?

A. Yes, sir.

Q. Did you discover any more blood between there and the injured man or any other evidences of injury?

A. How is that?

Q. Between where you discovered the first blood and the injured man did you discover any other blood or any other evidences of injury?

A. Yes, sir.

Q. What was it, and where?

A. There was several pieces of bone and blood there?

Q. Where were they—the blood and bone—with reference to the rail?

A. The blood was on the rail next to the top. The first blood now was on the rail next to the top and the bones was scattered and blood where the party was, I don't remember just how. The first bones I noticed was right where the blood was on the rail.

Q. That is the first piece of bone you found?

A. Yes, sir.

Q. Then from there on to the body there was bones?

A. Several pieces.

Q. Were they near the center or close up to the rail?

A. I don't remember but the first bone was close to the rail, lying right inside the rail where the blood was.

Q. What was the nature of the track there? Was it a dirt track or gravel?

A. The track there was rock.

Q. Crushed rock?

A. Yes, sir; it is not gravel.

Q. Did you discover any evidence of anybody being dragged from where you found the lantern to where you found the man?

174 A. No sir, I struck no signs from where I saw the man on the rail first. There is where I saw the blood first.

Q. That was all solid track there?

A. Yes, sir.

Q. How deep was that rock?

A. It was rock to keep the ties from rocking I suppose. The rock was up something level with the ties.

Q. You say that he was ninety-five yards north of the door of the depot?

A. Yes sir.

Q. How came you to discover him, Mr. Holt?

A. How come me to find him, you say?

Q. Yes, sir.

A. Well, I was walking in the direction of—

Q. What first attracted your attention to anything wrong there?

A. The unusual jerk of the train first attracted my attention.

Q. Where were you then?

A. Somewheres between 25 and 30 steps of the train.

Q. East, west, north or south?

A. I suppose I was west or a little west; southwest.

Q. What were you doing; walking along, standing or sitting?

A. Well, when the train jerked I was walking and I stopped.

Q. How many times if you remember did it jerk?

A. Well, it seemed to grind several times, but there was two large jerks, just "row row."

Q. Was it unusually hard or not?

175 Mr. McDONOUGH: I object because he isn't sufficiently qualified to answer. I move to exclude the other answer on that subject.

Court: Let him answer now what knowledge he has of the movement of a train.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. How far is your place of business from the trains—from the railroad track?

A. There is three tracks there and one of the tracks runs up to the back of our store to unload stuff in.

Q. Have you been there you say, three years?

A. Yes, last June.

Q. A great many freight trains pass there every twenty-four hours?

A. Yes, sir.

Q. You have notice- them pass there frequently?

A. Yes, sir.

Q. How was this lurching and jerking you spoke of compared with you heard them make before?

A. Well, there was more jerk than I had noticed before.

Q. Did you ever notice any such jerking as you noticed that night?

Mr. McDONOUGH: The Court understands our objections go to all of this.

Court: Yes sir.

A. I can't recall a jerk as heavy as that was. I thought the train was off the track was what I thought.

Mr. McDONOUGH: I move to exclude that last statement.

176 Court: Go ahead.

Defendant excepted to the ruling of the court, and asked that its exceptions be noted of record, which is done.

Q. Well, what did you do then after you heard that jerking? We have got you now I believe thirty yards from the track?

A. Twenty-five or thirty steps. I walked out there to see if I could locate what caused the jerking.

Q. Out on the track?

A. Yes, sir.

Q. Well, what did you find?

A. I found Mr. Olds. He was lying there behind the store.

Q. You walked out there after the train had left, did you?

A. Yes sir. I walked there and watched the train to see how far they would go before they discovered something was wrong with the train. I stayed there and watched it as long as I could see it.

Q. You went out there to find the trouble and didn't find anything but Mr. Olds.

A. I heard him at first and the wind was blowing so hard I didn't know what it was and I went for a light and got it and come back.

Q. To where he was?

A. Yes sir.

Q. Then is when you found him in the condition you have just described?

A. Yes, sir.

177 Q. How long now did he live, after that time?

A. I suppose about an' hour and forty minutes. Somewhere near that.

Q. Did you recognize him when you found him?

A. No sir.

Q. Was he conscious when you found him?

A. Yes, sir.

Q. How do you know he was conscious?

A. Why I asked him his name?

Court: You needn't tell what he said.

Q. You talked to him?

A. Yes, sir.

Q. You could tell from his talk he was conscious?

A. Yes, sir.

Q. Well, did you leave him lying on the track there?

A. No sir.

Q. What did you do with him?

Mr. McDONOUGH: I move to exclude that answer that he could tell from his talk he was conscious. I think the better rule would be to let him state what he said.

Court: No, I don't. Go ahead.

To the ruling of the court the defendant at the time excepted.

Q. What did you do, if anything, Mr. Holt?

A. Me and others put him on a wagon sheet, jumped in the store and got a wagon sheet and carried him to the waiting room, freight room of the depot.

178 Q. There he stayed how long before he died?

A. I don't know sir. We were not over fifteen minutes getting him in there. Twenty minutes after ten.

Q. How long before his death was it he lost consciousness?

A. I suppose he knew everything up apparently until thirty minutes before he died. Of course I am no physician.

Q. He talked up to that time rationally, did he?

A. Yes sir, at times, though of course he was suffering so, I suppose about thirty minutes he got to the place where he didn't say anything.

Q. Have you any doctor at Page?

A. No sir, no doctor.

Q. Did he have any medical attention?

A. No sir.

Q. Was there any anesthetics or anything administered to him to relieve his suffering?

A. No sir. I sent over to the store to get a little medicine but before it got back I didn't use it.

Q. Nothing at all to relieve his suffering?

A. No sir.

Mr. McDONOUGH: I move to exclude that on the ground there is no allegation to seek recovery for any failure to secure anything to relieve his suffering.

COURT: Go ahead.

Defendant excepted to the ruling of the court.

Cross-examination.

Questions propounded by Mr. McDONOUGH:

Q. Mr. Holt, you talked to him and asked him his name, did you?

179 A. Yes, sir.

Q. What did you say to him and what did he say to you about the accident and how it happened?

Judge FEAZEL: I object to that.

COURT: I will exclude that for the present because it is not cross-examination.

Mr. McDONOUGH: I offer it now and save exceptions to the Court's ruling.

Q. Mr. Holt, what was, in your opinion the length of that train?

A. I don't know sir, I couldn't state. It was a reasonably long train. I couldn't state the length of the train.

Q. Did you see any lights on top of the train? I mean lanterns?

A. As it went off I did. As it left the store.

Q. After you had discovered this jerking?

A. Yes, sir.

Q. Where was the light?

A. There was a light on top of the caboose or car one just after it passed the store for I stood and watched the light, thinking every minute that light would flag the train down. I thought there was something the matter with it and I stood and watched that light.

Q. How far from the engine or caboose was the light if you could tell?

A. I couldn't tell. I taken the light to be on top of the caboose. That was after I passed the store over the place where I found him.

Q. Did you see a light up by the engine? I don't mean
180 the engine light. Of course you saw the engine light?

A. If I did I don't remember it.

Q. Were you down at the station while the train was standing there?

A. I was not, no sir.

Q. Did you know that the train was standing at the station?

A. Yes sir.

Q. How far were you from the station while the train was standing at the station?

A. I was walking while the train was standing there. I came out of the house and I was walking up the big road, we call it, street in other words.

Q. How far from the station was that?

A. It is about forty-five steps, right at the edge of the right-of-way.

Q. What direction from the station? You were west?

A. That is, if you call that road north and south I was west.

Q. You were going in what direction?

A. I was going north.

Q. You were forty-five yards west; that is on the west side?

A. West side of the road.

Q. You were walking north?

A. Yes sir, and I had walked, I reckon, two hundred and fifty yards right along with the train, 150 yards parallel with the train.

Q. Were you 150 yards?

A. I suppose 150 yards.

181 Q. That was before the train started to move?

A. Yes, sir.

Q. Then you were 150 yards north before the — started to move?

A. No sir, I came out of the house south of the depot. The train was standing on the track when I came out of the house.

Q. How far is that house south of the depot if it is south?

A. Six hundred yards, maybe. Something like that.

Q. Did you walk right by the depot?

A. No sir, as I said I was about forty-five yards of the depot.

Q. Were you walking along the road?

A. Road; the street.

Q. That road runs parallel with the railroad?

A. Yes, sir.

Q. Does it remain about the same distance from the railroad all the way the distance you walked it?

A. Yes, sir.

Q. Tell the jury how far you walked along that road after you came out of that house before your attention was attracted to this jerking?

A. When I had left the road and walked toward the railroad track the train started up. I was walking right towards the train when it started up.

Q. Was your purpose to go across the track?

A. No sir.

182 Q. How far were you from the railroad rails, say, at the time the train started from the depot?

A. I don't know sir, I couldn't have been but little further than I was for the train started up and the jerking commenced and attracted my attention and I stopped and I was walking exactly towards the train and when the jerking commenced I stopped.

Q. You were approximately forty-five yards from the train when you heard the jerking?

A. No sir, I was closer than that.

Q. How close were you?

A. I guess I was in twenty-five or thirty steps.

Q. Was there any timber or houses between you and the railroad track?

A. Yes, sir.

Q. Timber and houses?

A. Timber. No houses. There was a wood shed and another little house there, just a very small house right between me and where the track was from the depot.

Q. You estimated the distance that the body was north of the depot by the rails or did you measure it?

A. I measured one rail and then I counted the rails and estimated by that.

Q. What length did you make the rail?

A. I have forgot. I think it was thirty or thirty-two feet. Thirty feet I believe. I had a pencil and piece of paper and set my calculations on it. It was nine and a half rails, somewhere along there. I figured it out.

Q. Did you measure the distance from the depot to the point where you found the first blood on the west rail?

183 A. I measured the distance from the tie the party was lying on to the depot.

Q. Did you measure to where you found the blood?

A. No sir. I measured to where he was lying.

Q. You estimated the distance from where he was lying to the blood at about how much?

A. He was lying somewhere about 12 or 13 feet—about 13 feet from where the blood was on the rail.

Q. Did you find any clothing or anything of that kind where that blood was?

A. No sir.

Q. You couldn't tell what part of his body had been run over by the wheel at that place?

A. I picked the pieces up. I pronounced it as the calf of his leg.

Q. Do you remember which leg it was, right or left?

A. It was both legs.

Q. Both the same?

A. Pretty much the same. Pretty much ground up.

Q. Bones out of both of them?

A. I don't know sir. They were perfectly limber. His left leg was twisted and the bottom of his shoe was toward his face when I went to him lying over on the other leg.

Q. The leg was completely broken?

A. Yes, sir; both of them.

Q. Did it have the appearance of a wheel running over the leg?

A. Yes, sir; it did to me.

184 Q. Did the other leg have the same appearance too?

A. Yes, sir.

Q. Could you tell from what you saw there which leg was run over first?

A. No sir.

Q. Those bones that you picked up on the inside of the rail where that blood was, were, in your opinion, or had the appearance of the bones from the legs?

A. Yes, sir.

Q. And from that part of the legs where the wheels had run over them?

A. Yes, sir.

Q. Did you find blood on top of the rail at that point?

A. I did, yes sir.

Q. Had that blood run down the sides of both sides of the rail?

A. No sir, the blood was on the inside on top of the rail near the inside. There was no blood on the outside of the rail that I found and I looked.

Q. But there was on top of the rail?

A. Yes sir, on top of the rail and on the edge of the rail next to the inside there was blood.

Q. None of the bones were on the outside of the rail?

A. No sir.

Q. Were the pieces of the bones from both of the legs on the inside of the rails there?

A. I couldn't state which leg the bones were out of.

Q. The point I am trying to ask about whether you found
185 similar bones showing there were bones from both legs?

A. I never noticed that close. If I did I don't know.

Q. Mr. Holt, did you examine from that point where the blood was back towards the depot to see any sign of blood?

A. Yes sir.

Q. Other blood?

A. Yes sir.

Q. Did you — any sign of other blood?

A. No sir. I examined that night and the next morning I examined it.

Q. You examined it carefully?

A. Yes, sir.

Q. You found no blood south of that where this blood was on the rail?

A. No sir.

Q. You didn't find any evidence of clothing on that point south of the rail, did you?

A. No sir, I did not.

Q. That was beyond or north of the station platform of the station?

A. Yes, sir; the train was going toward Heavener, north.

Q. Approximately how far north of the north end of the platform was this first blood?

A. I don't know exactly.

Q. You get what I mean?

A. About the north end of the platform where the blood was found?

186 A. Yes, sir.

Q. I don't know. I don't know how long the platform is. I walk over it every day but I never measured it.

Q. It is a gravel platform?

A. Yes, sir.

Q. It runs both north and south of the station?

A. Yes, sir.

Q. Are they both the same distance?

A. They are very near the same. The depot stands very near in the center.

Q. Give your best judgment about the length of the north end of the platform from the door of the waiting room or the window there where the operator sits? Just approximate it as best you can?

A. I walk over it a dozen times a day I guess some days. I suppose that platform will run 23 or '4 steps—good steps—maybe 25, somewhere along there. Of course that is hard to remember.

Redirect examination.

Questions by Judge FEAZEL.

Q. Mr. Holt, I believe you were asked something about lights. Did you see any light that night lying on the railroad track before you went up there?

A. No sir.

Q. While the train was moving out?

A. No sir, I saw a flash but I don't know what it was.

187 Q. A flash on the track?

A. Yes, sir.

Q. Did you see this flash close to where you later found Mr. Old?

Mr. McDONOUGH: That is leading.

COURT: Yes, it is leading.

Q. About where was that flash on the track with reference to where you found Mr. Olds?

A. It was back a few feet towards the depot. I thought it was—

Q. Don't tell what you thought. You saw it was back a few feet from the depot where you found Mr. Old.

A. Yes, sir.

Witness excused.

188

Testimony of O. C. Buschow.

O. C. BUSCHOW, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. What is your name, please?

A. O. C. Buschow.

Q. Where do you live, Mr. Buschow?

A. Page, Oklahoma.

Q. How long have you lived there?

A. Right at five years.

Q. Do you remember the occasion of the death of Leslie Old?

A. I do.

Q. That was in March sometime this year?

A. It was.

Q. Were you there that night at Page?

A. I was.

Q. Did you hear that train that night as it went out of Page?

A. I did.

Q. If there was anything about it that attracted your attention please state to the jury what it was?

Mr. McDONOUGH: Same objection to that, that I had to the other.

Court: Go ahead.

Defendant excepted to the ruling of the court.

A. Why, I had retired and baby and I were playing on the bed there. My wife—

Q. Just tell what you heard. I want you to make it as short as you can. You can't tell what your wife told you. You can
189 tell your attention was called to it.

A. The train pulled out with an unusual amount of hard jerking and I raised up in bed and listened at it and it pulled out for the full length of the train.

Q. How far were you from the track when you heard those jerks?

A. I would judge eighty or eighty-five feet.

Q. You had retired?

A. I had.

Q. Were the doors closed?

A. I think they were.

Q. Windows, doors and windows down?

A. No, the bed-room window on the east was up maybe four or five inches on the south was up four or five inches.

Q. When you discovered that jerking what did you do, if anything?

A. I didn't do anything. I just listened at it and that was all.

Q. Well, did you hear anything else later?

A. Yes, sir, I did. I heard the cries of someone.

Q. How long after you heard the jerking?

A. Well, I should judge a minute and a half, maybe two minutes.

Q. Where was the train now when you heard the cries?

A. The train had done passed out of hearing.

Q. What were the cries? distress or suffering, or what? What did the tone indicate.

190 Mr. McDONOUGH: That is objected to.

Court: What kind of cries?

Q. What kind of cries did you hear?

A. As if calling for help.

Q. What did you do then?

A. I jumped and went to the back door to hear what it was.

Q. The back door is toward the railroad from where your bed was?

A. It is.

Q. Did you open the door?

A. I did.

Q. Well, what did you hear then, if anything?

A. I heard the cries and I went then to the back gate of my yard.

Q. How close to where the cries were?

A. Well, it would be I expect a hundred or a hundred and twenty-five feet.

Q. Then, what did you do, Mr. Buschow?

A. I went back to the house and told my wife——

Q. Any conversation between you and your wife can't be told.

A. Well, I got my lantern then and started to take my wife over there to go out there.

Q. Did you go out there?

A. I did.

Q. What did you find when you got out there?

A. I found a man was run over.

Q. Who was he?

A. Supposed to be Mr. Old.

Q. You learned afterwards it was Mr. Old?

191 A. I did.

Q. What did you do with him after you found him?

A. Well, we decided on what we would do with him. The first thing we decided we would take him to the depot.

Q. You did carry him there?

A. I didn't assist in carrying him to the depot but I assisted in putting him in the depot after he got there.

Q. You know he was carried there?

A. Yes, sir.

Q. How long did he live after he was injured?

A. I don't know. He lived until 10:20 I expect, right at an hour and three-quarter- or two hours.

Q. Was he conscious during all that time?

A. No.

Q. What part of that time was he conscious?

A. About twenty-five or thirty minutes.

Q. At what period, just before or——

A. Well, when he was dying, when he was passing away.

Q. That is when he became unconscious?

A. Yes, sir.

Q. You discovered his wounds, or injuries I mean? Did you examine them?

A. Yes, sir; I looked at them.

Q. How was he injured?

A. Both feet were cut off below the knees, his legs, and his left

shoulder was badly mangled and he had a skinned place on his head on top of his head and his left hand was bruised, mashed.

Q. Do you know whether any of the bones were crushed in
192 the left hand or not?

A. I didn't touch his left hand. I don't know.

Q. Did you ever measure the distance now from where you found him to the depot?

A. I did not.

Q. What direction was he from the depot?

A. North.

Q. Did you make any examination of the track to ascertain where he struck the ground?

A. I did.

Q. What did you find there in the distances?

A. I don't quite understand you.

Q. I say what did you find on the tracks in the distances with reference to this body?

A. From where he was run over?

Q. No, from where you found him? First, what did you first find to indicate he was run over?

A. Blood and bones on the rails.

Q. How far south of where the body was found?

A. About fifteen or eighteen feet.

Q. State whether or not you found any other blood between there and where you found his body; any other blood and bones?

A. Yes, there were a few small pieces of bone scattered along the rail to where he lay.

Q. What did — find now between where you discovered
193 that blood and the depot, if anything?

A. We found his lantern.

Q. How far from where you discovered the blood? Was that south of the blood?

A. South of the blood, I expect fifteen or twenty feet.

Q. Did you make an examination to ascertain if there was any blood or bones between where the lantern was and the depot?

A. We did.

Q. Did you find any?

A. No sir.

Q. What condition was his lantern in when you discovered it?

A. The globe was broke off of it—out of it.

Q. In many pieces?

A. Well, I didn't see any pieces. The globe was gone.

Q. Did you find any glass around it?

A. I didn't look for any.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. Was the globe of the lantern north or south of the first blood that you found?

A. I didn't see the globe of the lantern.

Q. I mean the lantern.

A. The lantern was south.

Q. About twenty feet south of the first blood?

A. Something like that.

194 Q. Mr. Buschow, did you make an examination on that night?

A. Examination of the blood?

Q. Yes, sir.

A. Yes, sir.

Q. Was anybody at the depot when you got there that night?

A. Yes.

Q. Who?

A. Mr. Holt, Mr. George Tucker and H. Tucker had just got there when I came up.

Q. Was his lantern between the rails or outside of the rails?

A. I disremember, but I think it was on the outside of the rails, but I disremember. I wouldn't state.

Q. On the west side?

A. No, on the east side.

Q. On the east side?

A. Yes, if I remember, but I wouldn't say positively.

Q. You are uncertain about that?

A. Yes, sir.

Q. You didn't find the glass indicating that it had been broken from the globe of the lantern?

A. No, I don't look for the glass of the lantern at all.

Q. Did you go back there next morning and examine those premises in daylight?

A. I did.

Q. Referring to the first blood, was that on the rail?

A. Yes, sir.

Q. On the west rail?

195 A. No, on the east rail; the rail nearest the depot.

Q. Well, that is what I mean. It is the rail next to the

depot?

A. Yes, sir.

Q. I was calling that the west rail, but it is the rail next to the depot?

A. Yes, sir.

Q. And your best recollection is the lantern was on the same side?

A. Yes, sir.

Q. You are not certain about that?

A. I am pretty near certain it was but I won't swear to it.

Q. Do you remember that the lantern was on the same side that the blood was on; that is, I mean by that did you find blood on the east rail? Was the lantern on the east side?

A. I am positive that the lantern wasn't on the west side.

Q. The depot there is on the east side of the track?

A. It is.

Q. Was the blood, or part of it, on top of the rail?

A. Well you could see the sign of it was all, you know.

Q. Did it trickle down on either side of the rail?

A. No sir, it was kind of smashed up with bone, you know, and pieces of bone was hanging under the rail; little pieces of bone and blood clotted there.

Q. That was on the inside?

A. Yes, sir.

Q. Didn't find any on the outside?

196 A. No sir.

Q. Find any pieces of bone on the outside?

A. There was one little piece of bone down about where he lay on the outside, one small piece.

Q. Are you sufficiently familiar with the bones of the body to enable you to determine from what part of the body those bones came that were lying near where the blood was?

A. They would have to come from his leg as his clothes were not torn off of him at all. Therefore, they must be from the legs.

Q. There was no other part of his body mashed up that way?

A. His left shoulder was mashed, understand, but his coat wasn't tore off of him.

Q. No bone crushed up there?

A. No sir.

Q. Were the trousers or pants cut into, the legs?

A. They were practically off below the knee.

Q. Were the cut square off Mr. Buschow or about the same on each side?

A. I don't believe I can state that. They were cut off anyhow.

Q. So far as you can remember they were about the same on each leg?

A. I think so.

Q. You don't remember any difference?

A. No.

Q. Did you find any of the pants where the blood was?

197 A. No sir.

Q. Did you find the pants still on him?

A. Yes, sir.

Q. It had been practically cut in two but there were shreds holding it there of the clothing?

A. Yes, sir.

Q. Did that have the appearance of that cut having been made by the wheels of a train?

A. Yes, sir.

Q. The car?

A. Yes, sir.

Redirect examination.

Questions by Judge FEAZEL:

Q. Mr. Buschow, you don't pretend to tell the jury as a fact the lantern was lying on the outside of the rails do you?

A. I said I would not say.

Q. That is just your recollection now?

A. I am positive it was not found on the west side but I don't know whether it was in the center of the track or on the east side.

Witness excused.

198

Testimony of E. Maggard.

E. MAGGARD, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Maggard, where do you live?

A. Page, Oklahoma.

Q. How long have you lived there?

A. About five years.

Q. Do you remember when Leslie Old was killed at Page, on the night of the 24th of March, 1913?

A. Yes, I was there when he was killed that night.

Q. Where were you when the train pulled out of Page that night?

A. I was at home in bed.

Q. How far did you live from the railroad track?

A. Something like a hundred yards I guess.

Q. You say you had retired?

A. Yes, sir.

Q. Had the family retired?

A. Yes, sir.

Q. State whether or not your doors and windows were closed?

A. Yes, sir.

Q. Did you hear or notice anything unusual about that train as it went out that night?

A. Yes, sir; it was jerking like it had a stuck brake or something like that.

Q. How many and how hard were the jerks?

A. I don't remember.

199 Mr. McDONOUGH: Same objection and exception to that Your Honor.

A. I couldn't hardly say as to that. I just noticed the jerking.

Q. Well, state whether or not it was unusual.

A. Well, it was a little bit I think.

Q. Harder than you had ever heard before?

A. No sir, I have heard them jerk that hard before but it was a little unusual or I wouldn't have noticed it.

Q. You did notice it?

A. Yes, sir.

Q. How long did it continue, if you remember?

A. Well, I disremember now.

Q. Three or four or half a dozen seconds? Something like that?

A. Yes, sir; I suppose it did.

Q. Well, which now? We want the benefit of your best judgment?

A. Well, it seems to me like it jerked, oh, four or five times something like that.

Q. Have you ever had any experience as a railroad train operator?

A. Nothing only engine waiting is all.

Witness excused.

200

Testimony of R. L. Bailey.

R. L. BAILEY, the next witness on behalf of the plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Bailey, where do you live?

A. I live at Heavener, Oklahoma.

Q. Did you know Leslie Old in his lifetime?

A. Yes, sir.

Q. Do you remember the night he is alleged to have been killed at Page, Oklahoma, by a railroad train?

A. Yes, sir.

Q. You remember the circumstances, do you?

A. Yes, sir.

Q. Were you on that train that night?

A. Yes, sir; I was on the train.

Q. Where did you get on the train?

A. Rich Mountain.

Q. Where had you been?

A. I had been to Mena.

Q. How came you at Rich Mountain?

A. Well, I came up on number Four at Rich Mountain.

Q. What is number Four? a passenger train?

A. Yes, sir.

Q. Did you have business at Rich Mountain?

A. Yes. I had a little business there.

Q. What time did number Four get there?

A. Well, I couldn't say just what time.

Q. Now, how long had you been there when the train
201 Leslie Old was brakeman on got there?

A. The train he was on was there when I got there.

Q. Well, how long did it stay there?

A. Well, I didn't stay but a short while; couldn't say just how long.

Q. Which left first, the passenger or the freight train?

A. The passenger left first.

Q. About how long first?

A. Well, it must have been ten or fifteen minutes. I don't remember just how long.

Q. Now, will you explain to the jury how came you on that freight train?

A. Yes, sir. Well, I came up on number Four from Mena, stopped off, had a little business there, and I aimed to go on the night passenger. The train was there. Leslie Old was braking. The train that Leslie Old was braking on was there and me and him got to talking and I told him I was going to go up to Heavener that night, and he said, "get on and go with me", and that is how come me to get on.

Q. Now, did you ride that train from Rich Mountain to Heavener?

A. Yes, sir.

Q. Were you with Leslie Old from there to Heavener at any time; if so, what part of the ride were you with him?

A. Well, I was with him most all the time from there to Page.

A. From Rich Mountain to Page?

202 A. Not all the time.

Q. Were you on the same car all the time after you got on it until you got off or not?

A. Yes sir, I was on the same car.

Q. What kind of a car were you on?

A. It was a coal car, I believe, loaded with lumber anyway, it wasn't a box car.

Q. Coal car loaded with lumber?

A. I think it was.

Q. Did you notice what is called an oil tank somewhere near that coal car? If so, what direction was it from the car you were on and about how many cars were you from it?

A. I couldn't be positive that I did. I think there was an oil car two or three cars back from this car but ain't positive. It just seemed to me there was. I ain't sure, though.

Q. Now then, do you remember when the train was passing out of Page on toward Heavener?

A. Yes sir.

Q. Where were you then and what were you doing as it passed out?

A. I was lying down on this car.

Q. Stomach or back?

A. I was lying on my back.

Q. If anything occurred to that train while it was passing out of Page that night, please explain what it was and what effect it had on you, if anything?

203 A. After the train started out the only thing I taken notice to was it taken a jerking spell, then it seemed like kind of checked up, and then started up, just kind of check and start.

Q. What effect, if any, did that jerking have upon you?

Mr. McDONOUGH: If the court please the same objections to both these questions as urged to the others.

Court: Very well.

Defendant excepted to the ruling of the court.

Q. Any shifting of your position?

A. Why, it slipped me on the lumber some when it jerked.

Q. About how far in your judgment did you slip?

A. I don't know. I guess a foot. Might have been more.

Q. Now then, did you hear anybody hollering?

A. Yes sir, I did.

Q. When did you hear them hollering with reference to the jerking?

A. Just as the train jerked the last time I heard somebody holler. They hollered twice.

Q. How did they holler?

A. Just "Oh! oh! sort of like that.

Q. Could you tell the direction it was from?

A. No sir, I could not. It seemed to be tolerably close, but I couldn't tell what direction.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. Had you known Mr. Leslie Old before that?

A. Yes, sir.

204 Q. Where had you known him?

A. At Heavener.

Q. What business are you in at Heavener?

A. At that time or now?

Q. At that time?

A. I was running a flour and feed business there.

Q. What business are you in now?

A. Filing for a saw mill.

Q. You are not operating a saw mill?

A. No sir.

Q. What business did you have at Rich Mountain?

A. Well, I was wanting to speak to a party there about some flour I had shipped there.

Q. Did you pay Leslie Old for that trip up there?

A. No sir.

Q. You knew it was against the rules for you to ride on that train?

A. Well, I can't say that I did.

Q. Haven't you been about railroads enough to know that it is against the rules of the company and against the law to ride on through freight trains?

A. No sir, I did not know it was against the law.

Q. You knew it was against the rules of the company?

A. I knew there was many rode that way.

Q. You knew that the employees were forbidden to let anybody ride on those freight trains, didn't you?

A. No sir, I didn't know that.

205 Q. Did you think that Leslie Old had a right to carry you on that train?

A. I never thought anything about that.

Q. Didn't you know he did not have a right to carry you on that train?

A. No sir, I didn't know it.

Q. Why did you conceal yourself then?

A. Why, I didn't conceal myself.

Q. Why didn't you go into the caboose?

A. I says, "where will I get", and he says, "get upon that car there".

Q. You knew he was not the conductor, didn't you?

A. Well, I knew he was a brakeman.

Q. You knew then he was not the conductor, didn't you? Is there any reason why you can't answer that question?

A. No sir, I don't know as there are.

Q. Then, why don't you answer it?

A. I knew that he was the brakeman.

Q. Well, who was the conductor?

A. I do not know.

Q. Do you know Harry Eames?

A. I have seen him since he has been here and learned — Harry Eames.

Q. Then, you knew Leslie Old was the brakeman; therefore you knew he was not the conductor?

A. Yes, sir.

Q. You knew the part of the train where his duties were, too, didn't you?

206 A. How is that?

Q. You knew that part of the train where his duties were? You knew that he was swing brakeman?

A. No, I didn't know that he was swing brakeman.

Q. You asked him where to get?

A. Yes, sir.

Q. And he told you?

A. Yes, sir.

Q. And you obeyed him?

A. Yes, sir.

Q. What did he say about it being against the rules to you?

A. He never said anything.

Q. Why didn't you ask him or say to him you had better get in the caboose if you were a passenger?

A. Well, I asked him where I would get and he told me.

Q. Now, do you mean to tell the jury that you were riding as a passenger on that train?

Judge FEAZEL: That doesn't make any difference, if the court please.

Court: I think it does. I think it goes as to his credibility. Plaintiff excepted to the ruling of the court.

A. No sir, I don't mean to tell the jury.

Q. You knew you were a trespasser on the train, didn't you?

A. I was riding there by his consent.

Q. You knew he didn't represent the railroad in that respect and didn't have any authority to let you ride?

A. No, I——

Q. You are not an employee of the railroad company?

A. No sir.

207 Q. How old are you?

A. Forty-four.

Q. How long have you lived about railroads?

A. Why, I have been living around near railroads a good deal.

Q. How long? One year?

A. Oh, I guess——

Q. Twenty-five?

A. All told, twenty or twenty-five years.

Q. And you tell the jury you didn't know and never did know it was against the rules to ride on a through freight train?

A. In fact—

Q. Do you tell me that. Is that what I understand you to say? I want to know if I understand you to say to this jury you did not know it was against the rules to ride on freight trains?

A. I don't know anything about the rules?

Q. I didn't ask you that. Didn't you know it was against the rules to ride on freight trains. In other words, did you think you had a right to ride on that train just as you would ride on a passenger train?

A. Well, I thought this: I thought if it was al-right with him I could ride on it.

Q. If you could rob the railroad out of that fare it was al-right with you? You never paid anything for it?

A. No sir.

Q. You never offered to pay anything for it?

208 A. No sir.

Q. What would your ticket have cost you from Rich Mountain to Heavener?

A. Well, I don't know.

Q. Well, about what? You have never offered to pay it, have you? You never paid for that trip?

A. No sir.

Q. You went on through and rode the trip, didn't you?

A. Yes, sir.

Q. When did you first meet Mr. Old that day?

A. At Rich Mountain right at the depot.

Q. Meet him at Mena first?

A. At Rich Mountain.

Q. I say didn't you meet him at Mena first?

A. No sir.

Q. Have any whiskey with you?

A. Yes, sir.

Q. How much did you have?

A. I had a quart.

Q. Where did you buy that?

A. I bought it at Mena.

Q. Did you give any of it to Mr. Old?

Judge FEAZEL: That is not proper cross-examination. Don't answer that question.

Court: I expect you had better introduce that on your direct examination.

Mr. McDONOUGH: Al-right, I will recall him for that.

Witness Excused.

209

Testimony of Frank Sweeney.

FRANK SWEENEY, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Sweeney, where do you live?

A. Texarkana, Texas.

Q. Have you ever had any experience in the train service?

A. Yes, sir, I have, had some experience in the train service.

Q. How long have you been working in the train service and in what capacity?

A. Why since 1887 I have been in the train service and engine service together.

Q. How much experience have you had during that time as a brakeman?

A. About twelve years I suppose.

Q. What railroads have you been breaking on?

A. I worked for the T. P. and Sante Fe, the Houston Texas Central, the M. K. & T. and St. Louis and Southwestern.

Q. That is called the cottonbelt, isn't it?

A. Yes sir. And St. Louis & San Francisco.

Q. That is called the Frisco, is it?

A. Yes sir. The Iron Mountain, St. Louis & Iron Mountain; International & Great Northern; M. O. & G.; Shreveport & Red River Valley; Vicksburg, Shreveport and Pacific; and this M. D. & G.—well, construction work for them.

Q. Now, Mr. Sweeney, during your experience in train service have you had occasion to notice the appliances on freight cars?

A. Yes sir.

210 Q. As to ladders and grab iron?

A. Yes, sir.

Q. Will you state to the jury whether or not the railroads operated in this country have end ladders and end grab irons on their freight cars?

Mr. McDONOUGH: Objected to if the court please, because not competent or relevant; it is not an issue in the case.

Court: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

A. Yes, sir.

Q. About what proportion?

Mr. McDONOUGH: I don't care to argue the matter but I would like to call the attention of the court to the fact that the kinds of cars are not described in order to show qualifications and construction and make of the law.

Court overruled defendant's objection and defendant excepted.

Q. About what proportion of ordinary box cars has these end ladders or grab irons?

A. In my experience I found about fifty per cent or perhaps more. It would be hard to get at it but I believe at least fifty per cent of them are equipped with the end ladders.

Q. Now, coming to the refrigerator cars, Mr. Sweeney, from your observation, about what per cent of refrigerator cars are so equipped?

A. I should think about seventy-five per cent of the refrigerator cars; that is, the private line cars and refrigerator.

211 Q. Now then, state whether or not you have observed any cars that were not equipped with end ladders, that had grab irons on the ends of the cars?

A. Yes, sir.

Mr. McDONOUGH: Objected to as not competent, relevant or material.

COURT: Go ahead.

Defendant excepted to the ruling of the court.

Q. Where are those grab irons generally located on the cars?

A. They are located on the end where the ladder comes down, at the side of the car on the end of the car.

Q. Well, about how many generally?

A. Well, when the brake staff comes down to the end of the car there is seldom more than one when the brake staff comes down to the end of the car. There is also a brace that goes on some of the cars, that is: a kind of a tie brace on the end of the car that can be used as a hand hold.

Q. That goes clear across the car?

A. Yes, sir.

Q. About how high from the bottom of the car?

A. That would be about, I think three and a half feet or four feet from the bottom of the car.

Q. This brake staff you are talking about? When that is there can that be used as a hand hold?

A. It could be used for that purpose. It is not for that.

Q. State whether or not there is a good many cars in use in this country that has hand holds in addition to the one down at the bottom you have described?

212 A. Yes sir, a great many have that.

Mr. McDONOUGH: Same objection.

Court overruled defendant's objection and defendant excepted.

Q. Now Mr. Sweeney, please state to the jury, whether or not, in your opinion, from your experience it would be safer in a brakeman passing from the top of a high car to a low car to have these end ladders or end hand holds on a box car?

Mr. McDONOUGH: Objected to as incompetent, irrelevant and immaterial.

COURT: Overruled.

Defendant excepted to the ruling of the court.

A. Why, yes. It would be safer for a man to get from a high car

to a low car if it was equipped with an end ladder or grab iron or some hand hold that a man could hold onto to step from one car to the other.

Q. When they are not equipped with end ladders or hand holds but are equipped with side ladders how can the brakeman or how does he usually get from the high car to the low car?

A. There is a truss rod on some cars running out, if he hasn't got a grab iron to hold to he has to get a foot hold the best he can and jump from one car to the other.

Q. He has got nothing to hold to?

A. No sir.

213 Q. Would he necessarily have to turn loose his hand hold on the box car on the side of the box car before he could catch with his hand on the front car?

Mr. McDONOUGH: Objected to because incompetent, irrelevant and immaterial, and because it calls for a conclusion.

COURT: Yes, it is leading.

Mr. McDONOUGH: Does the court sustain or overrule the objection?

COURT: I will let him answer it. Go ahead, answer the question. To the ruling of the court the defendant at the time excepted.

A. A man stepping from one car to another it is owing to what size man he was. A man like me I would have to turn my hand hold loose on the box car before I could get over to the low car.

Q. Will you please explain Mr. Sweeney, why it would be safer to have ladders on the end of the car or grab irons on the end of the car in assisting the brakeman to pass from a high to a low car?

A. Well, it would have them on the side—

Mr. McDONOUGH: Objected to because incompetent, and irrelevant and because the witness doesn't show proper qualification.

COURT: Go ahead, answer the question.

Defendant excepted to the ruling of the court.

A. Well, in stepping across a car in going from a box car to a low car he would have a hand hold in case his foot slipped he would have something to hold himself from falling.

Q. Please state whether or not he would not also be 214 nearer the low car?

A. Yes, sir.

Mr. McDONOUGH: Objected to because leading, and because incompetent and irrelevant.

Court overruled defendant's objections and defendant excepted.

Q. It would be nearer the low car?

A. If he came down the end ladder on the side of the car if there is not an end ladder would have to go around the end of the car the best he could and step across.

Q. In other words he would have to swing around the end of that car?

A. Yes sir.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. What is your business now Mr. Sweeney?

A. I have got a place in Texarkana, a little home, and I have got a little place of business in town. Restaurant and short-order house, I am proprietor of it.

Q. How long have you been running a restaurant and short-order house?

A. About four months.

Q. What was your business before that?

A. Before that time I was working for the St. Louis, South-western Railway Company out of Pine Bluff, between Pine Bluff and Texarkana.

Q. What date did you quit the Cotton Belt?

215 A. I couldn't give you the exact date.

Q. Approximately what date?

A. Along in January sometime.

Q. January, 1913?

A. Yes sir.

Q. How long had you been working for the Cotton Belt at that time?

A. I think I worked about three or four months the last work I did for them.

Q. Braking?

A. Yes sir.

Q. On freight trains?

A. Yes sir.

Q. What railroad had you been working for before you worked for the Cotton Belt at that time?

A. I was with the Ball Construction over the M. D. & G. from Nashville into Ashdown.

Q. Operating a train over the M. D. & G.?

A. The Ball Construction Company.

Q. A railroad construction company?

A. Yes, sir.

Q. In what capacity were you working for them?

A. Train master.

Q. Your duties as train master included the brakeman?

A. No sir, I had charge of the—

Q. How long were you in that position?

A. Between three and four months.

216 Q. What position did you have immediately before that?

A. Immediately before that I was running a train on the

M. O. & G.

Q. Between what points on the M. O. & G.?

A. Between Muskogee and Henrietta.

Q. What kind of work there?

A. Well, I had charge of five or six crews working in the mines. In addition to that I made a round trip a day on the passenger run.

- Q. What were you doing in the mines?
 A. We were handling coal cars.
 Q. What were you doing?
 A. I was general foreman and conductor.
 Q. Mule cars?
 A. No sir, railroad cars.
 Q. In the mine?
 A. Yes sir, they went to the mines for coal to be loaded on.
 Q. Did you work down in the mines?
 A. It was the railroad that went out to the mines that hauled coal in from the mines.
 Q. I believe you stated you had been in the railroad braking service about twelve years?
 A. I think I said about what I put it at would be about twelve years.
 Q. You worked for twelve or thirteen railroads during that time?
 A. Yes sir.
 Q. You changed your positions a good deal, didn't you?
 217 A. I did when I was a young man, yes sir.
 Q. What is your age now?
 A. Forty nine years old.
 Q. And you worked as brakeman four months ago?
 A. Yes sir.
 Q. You began this twelve years service how long ago?
 A. I commenced in '87 when I done my first braking.
 Q. When were you subpoenaed here as a witness?
 A. I believe it was sometime the last of last month sometime.
 Q. Are you interested in this law suit?
 A. Not in no way at all sir.
 Q. Are you acquainted with Judge Feazel?
 A. No sir, I never knew him until I met him here.
 Q. Do you know Mr. Leslie?
 A. No sir.
 Q. Do you know any of the parties to the suit at all?
 A. No sir.
 Q. Do you know how it was they selected you, a proprietor of a short-order house as an expert brakeman?
 A. I do not, no sir.
 Q. You live on the Arkansas side or Texas side?
 A. My business is on the Arkansas side.
 Q. But your home is on the other side?
 A. My home is in Texas and it is where it has been for the last twenty-two years.
 Q. With whom did you first talk about this case?
 218 A. The only talk I have ever had was with Judge Feazel—asked me a very few question-
 Q. When was that?
 A. It was day before yesterday: Wednesday.
 Q. That was after you were here as a witness?
 A. Yes sir.
 Q. Never had any talk with anybody before that time?
 A. Not a word.
 Witness excused.

219

Testimony of Richard Lee.

RICHARD LEE, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge FEAZEL:

Q. Mr. Lee, where do you live?

A. De Queen.

Q. How long have you been living in De Queen?

A. I have made it my home about fourteen years.

Q. What are you engaged in?

A. In the train service.

Q. What character of service?

A. I am presently employed as brakeman and extra conductor.

Q. How long have you been at work in the train service as brakeman?

A. Why eleven years; about eleven years.

Q. What railroads have you worked for as brakeman?

A. Kansas City Southern, Texas Pacific, Mountain——

Q. That is the Iron Mountain?

A. Iron Mountain, Cotton Belt and Santa Fe.

Q. During your work as railroad brakeman have you had any occasion to observe the appliances used on the freight trains by railroads in this country or over which you worked as to such equipments as end ladders and end grab irons?

A. Yes, sir.

Mr. McDONOUGH: Same objection, your Honor.

The court overruled the objection of the Defendant and defendant excepted.

220 Q. Will you please state to the jury about what proportion of the cars—freight cars; that is, box cars—are equipped with end ladders and end grab irons?

A. I couldn't say exactly.

Mr. McDONOUGH: I also include that the witness doesn't show sufficient qualifications.

Court overruled defendant's objection to which ruling of the court defendant excepted.

Q. We just want the benefit of your best judgment; we don't expect you to be exact about it?

A. I should think not more than half.

Q. About half of them then are either equipped with end ladders are they, or end grab irons?

A. I would think not more than half.

Q. Now then, those end grab irons, do they have the grab irons when they have the end ladders or do the end ladders answer for the end grab irons?

A. You mean do they have both?

Q. Yes, sir.

A. Why, not in all cases.

Q. Now when they don't have end ladders, where generally are the end grab irons located?

A. On the side of the car, the corner.

Q. I mean on the end of the car, I don't mean the side end ladders.

A. You mean the ladders that goes to the top of the car?

Q. On the end of it, not on the side of it?

A. Why there is one and two grab irons on the end of the car.

221 Q. Where are they generally located?

A. There is one on the bottom of the car sixteen to twenty-four inches on the sill and then some have another grab iron up higher.

Q. How high up on the car?

A. Probably four feet; something like that.

Q. What advantage is that to the brakeman?

A. It is used in going around the end of the car.

Q. You mean it gives him something to hold to?

Mr. McDONOUGH: Objected to as leading.

Court overruled defendant's motion, to which ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. Yes sir.

Q. Now Mr. Lee, please state to the jury from your experience and observation in your opinion whether or not it would be safer in going from a box car or refrigerator car, that is, a high car to a low car to have there end ladders or end grab irons?

Mr. McDONOUGH: Same objection to that.

Court: Answer the question.

Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

A. I believe it would.

Q. Will you state to the jury whether it would be safer in your opinion?

Mr. McDONOUGH: Same objection as to that.

Court: Go ahead.

222 Defendant excepted to the ruling of the Court and asked that its exceptions be noted of record, which is done.

A. Well, it would be a shorter step.

Q. Well, is there any other reason that it would be safer? Wouldn't you have something there to hold to with your hand until you catch lodgment on the other car?

Mr. McDONOUGH: That is objected to as leading and for the reason it is a conclusion.

Court: Yes, it is leading. Go ahead and answer the question.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

A. Yes.

Q. Wouldn't that be much safer? Would it or would it not be much safer in going from a high car to a low car to have these ladders or grab irons than to go down the ladder on the side of the car near the end and swing around the high car onto the low car?

Mr. McDONOUGH: That is objected to because leading and suggestive and for other reasons heretofore urged against the others.

Court: Answer the question.

A. Yes.

Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. Mr. Lee, please state to the jury what has been your observation or what appliances, if any, you have observed that are attached to oil or tank cars to assist the brakeman in going from a high car to an oil car or from an oil car to a high car?

223 Mr. McDONOUGH: Objected to as irrelevant, immaterial and incompetent.

Court: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

A. There is different kinds of oil tanks.

Q. Well, describe them to the jury, some of them, as many as you can think of? Now, just give us the benefit of your observation on that, please, Mr. Lee?

A. Why, there is a side railing on some of the cars that extends to the platform and then there is other hand holds that is on the side of the tank; that is, the drum of the tank.

Q. Any others?

A. Some of them have grab irons on the end of the tank. That is about all that I know of.

Q. Don't some of them have what is called end ladders or not?

Mr. McDONOUGH: Objected to as leading.

Court overruled defendant's objections and defendant excepted.

Q. Did you ever notice any of that kind?

A. Yes, there is a type that extends from the platform of the oil tank.

Q. Up to how high?

A. Up to the top of the car, to the hand railing on top.

Q. How would that be compared with the level of an ordinary box car, the top of that ladder?

224 Mr. McDONOUGH: That is objected to, if the court please, for the further reason there is no allegation in the complaint alleging you should have it and the additional other objections urged as against the others.

Court: Go Ahead.

Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. About how near would that end ladder come to the top of an ordinary box car or refrigerator car?

A. Why the top of that running board is about four feet lower than the top of the ordinary box car?

Q. About what length of service, in your judgment, would it take a man of ordinary intelligence to acquire sufficient experience to become thoroughly familiar with the dangers incident to the work of a brakeman?

Mr. McDONOUGH: Objected to because incompetent, irrelevant and immaterial, and because there is no allegation in the complaint to authorize it, and because the witness is not qualified to answer the question.

COURT: Go ahead.

Defendant at the time excepted and asked that its exceptions be noted of record, which is done.

A. That is a pretty hard question to answer.

Q. I know it is, but we have got to have the judgment of such people as you in this line.

Mr. McDONOUGH: Objected to because that is an argument.

COURT: Answer it if you can; if you can't say so.

Defendant excepted to the ruling of the court.

Q. We just want your judgment. How long would he have to work?

Mr. McDONOUGH: I just want to call the court's attention to the fact he has rather indicated he didn't know.

COURT: I want to find out whether he does or doesn't.

Defendant excepted to the ruling of the court.

Q. About how long, in your judgment, would it take him to become sufficiently experienced to fully appreciate the dangers of his work?

A. I would think a year or eighteen months; possibly two years. Of course there is exceptions.

Cross-examination.

Questions by Mr. McDONOUGH.

Q. Where do you live?

A. De Queen.

Q. Are you in the service of any railroad now?

A. Kansas City Southern.

Q. What class are you working in now?

A. Train service.

Q. Running out of De Queen?

A. Yes, sir.

Q. Mr. Lee, when were you summoned in this case?

A. I don't remember the exact date.

Witness excused.

Mr. McDONOUGH: I want to raise this question: that it isn't proper to go ahead with the trial of this case after the

jury have been engaged in the trial of other cases. My opinion is in a case of that kind the only proper remedy for it is to—

Court: Gentlemen of the jury, in this case no person has spoken anything about anything pertaining to this case since we separated before, have they? (No answer).

You have heard nothing about the case to form any sort of an opinion since we adjourned the case over before? Answer "No". None of you have received any information of any kind by which you formed any sort of an opinion? Answer "No".

Defendant excepted to the Court overruling its motion and asked that its exceptions be noted of record, which is done.

Testimony of H. W. Hopson.

227 H. W. Hopson, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge FEAZEL:

Q. Where do you live, Mr. Hopson?

A. Texarkana, Arkansas.

Q. What business, if any, are you engaged in there?

A. I am switchman in the Texarkana yard.

Q. What railroad company?

A. St. Louis, Iron Mountain & Southern.

Q. How long have you been connected with the Iron Mountain Railroad Company in the capacity of switchman at Texarkana?

A. Well, I have been working for them ten years this last time.

Q. At Texarkana?

A. Yes, sir.

Q. Have you been working for them in the switch yards all that time?

A. Yes, sir.

Q. Please state whether or not your duties as switchman are along the line of the duties of a brakeman on a freight train?

A. Yes sir, it is practically the same thing, only I have more of it than the brakeman does.

Q. How long have you been engaged in the train service along that line? How many years of experience in other words, have you had?

228 A. Well, between fifteen and twenty years, somewhere along there. I don't know just exactly how long, that is, as braking and switching and conductor.

Q. Mr. Hopson, what appliances, if any, do the railroad companies operating freight trains in this section of the country usually have on the ends of their box cars or refrigerator cars to assist brakemen to pass going from the top of a box or refrigerator car to the floor of a flat car or low car.

Mr. McDONOUGH: Objected to on the ground that the witness is not sufficiently qualified, because the evidence is not material or relevant or competent, and for the further reason that the question as to a box car, under the allegations in the complaint and the state-

ment of counsel to the jury, is not relevant in this inquiry at all. The only cars to which the testimony should be directed would be a National Zinc Company car, the tank car like the one described in the complaint, S. F. R. D. named in the complaint; I also make the same objections to the introduction of the evidence of this witness that are made of the evidence of the witnesses on the same subject of last week, and if it is possible to save exceptions without interrupting any more to this character of evidence I would like to do it.

COURT: You may let your exceptions be noted to all this line of testimony as to the equipments usually had by railroad companies operating in this section of the country. Proceed. Answer the question.

To the ruling of the court in not excluding the line of testimony referred to the defendant at the time excepted and asked
229 that its exceptions be noted of record, which is done.

A. We usually have ladders to go down on. Always have ladders to go down on.

Q. Where are those ladders usually located?

A. Some of them have end ladders and side ladders.

Q. About what per cent or what proportion, in your opinion, have the end ladders?

A. Well, really, all the refrigerators have end ladders. Some of them have end and side ladders.

Q. Now, in the absence of end ladders, are there any other appliances used on any of the cars that would be beneficiary to the brakeman in passing from a high car to a low car; such as a grab iron or a hand hold?

A. Well, they have the side ladder on them when there is no end ladder but then they usually have from one to two hand holds on the end of the car.

Q. Describe to the jury where these hand holds are located?

A. Well, there is nearly always one at the bottom of the car, I suppose a foot or fourteen inches something like that from the bottom of the car, and where they have two, there is usually another one up about two feet and a half from that.

Q. Now then, are there any other appliances besides the end ladders and these grab irons or hand holds that a brakeman may use in passing from a high car to a low car.

A. You usually find the brake staff running along there. You sometimes catch hold of the brake staff in the absence of
230 the hand hold; that is, if there is one on that end of the car.

Q. Where are the brake staffs located generally?

A. They always have a brake on the car; that is, supposed to have a brake on there, but it is not likely to be right where he is climbing down. It is liable to be on the opposite side of the car from him.

Q. Now then, if a brakeman in performing his duties had to pass from the top of a high car to the floor of a low car, would it, in your opinion, be safer to have these end ladders or end hand holds and grab irons on the end of the car than to come down the

ladder on the side of the car and attempt to step from that ladder on to the floor of the low car in front?

Mr. McDONOUGH: The same objection to that.

Court overruled defendant's objection and defendant excepted to the ruling of the court.

A. Of course any one would rather go down an end ladder.

Q. The question is wouldn't it be safer where you had that work to do?

A. I would consider it very much safer because there is nothing to brush you off going down the inside ladder and a man is liable to be raked off in passing side tracks or anything where you go down the side ladder.

Q. Would it not also put him nearer the landing place of the flat car?

A. Yes, sir, it is saving quite an expense and wouldn't
231 throw him in an awkward position. In stepping around the side it is liable to put him in an awful shape.

Q. What equipments or appliances do oil or tank cars have on ends to assist in passing from the top of a box or a refrigerator car to the floor of a tank car where the floor is used as a walk way?

Mr. McDONOUGH: Same objection.

Court overruled defendant's objection and defendant excepted to the ruling of the court.

A. You mean what kind of hand holds?

Q. Anything on the end of this oil or tank car. What is usually there to assist the brakeman in going from the top of the box car on the floor of the oil or tank car where the floor is used as a walk or run board.

A. Well, there should be grab irons or ladders placed on the oil car where a man could very easily reach one. An oil car is a very dangerous car to get on.

Q. Now, then Mr. Hopson, will you tell the jury what the usual distance is between; that is, in railroad freight trains, between the ends of cars.

A. I never measured the distance, but I should judge, in seeing it, would be between two and a half and three feet.

Q. Where the cars are equipped with side ladders how near the ends of the box or refrigerator car are those side ladders?

A. Well, I suppose the end of the hand hold will go about
232 two or three inches from the corner of the car.

Q. How are they, as a usual thing, placed on the side of the car; perpendicular or horizontal?

A. Horizontal. I suppose you call it horizontal across.

Q. Now, assuming we have a refrigerator car with only one end grab iron and that within eighteen inches of the floor of the car and equipped with a side ladder on the end, a tank or oil car immediately in front of that equipped with side railings and those side railings come to within only fourteen inches of the end of that oil car, now, will you please explain to the jury whether the brakeman in making that passage from the refrigerator car to the oil car

could make a safe landing on the oil car and secure a hand hold there without turning loose the hand hold on the side of the box car?

Mr. McDONOUGH: Objected to as leading and calling for a conclusion and the additional other objections.

A. The railing on the tank car comes to within fourteen inches of the end of the flat car and the side ladders on the box car you say it is within a few inches of the end?

Q. Yes sir. Now then, could he step from that side ladder over on the floor of the tank car and secure a hand hold on that side railing without turning loose his hand hold on the refrigerator car?

A. He might maybe do something like that but I wouldn't do that.

Q. Why?

233 A. Because I think more of myself than I do of the car.

Q. The jury may not understand what you mean. Please state to the jury what you mean by that?

A. I wouldn't want to get killed.

Q. You think it would be dangerous to do that?

A. Yes, sir.

Mr. McDONOUGH: Objected to as leading.

Court overruled defendant's objections and defendant excepted.

A. Of course there is men that does such things as that but I wouldn't do it.

Q. What length of service, Mr. Hopson, in your opinion, would be required of a man of ordinary intelligence as a brakeman to become an experienced brakeman?

Mr. McDONOUGH: Objected to for the same reason.

Court overruled defendant's objections and defendant excepted.

A. It took me about two years before I knowed how to keep from getting killed. I should think it would take all the way from eighteen months to three years.

Q. Please state to the jury, in your opinion, if a person of ordinary intelligence in performing the duties of a brakeman on a freight train could become familiar with the dangers and hazards of the occupation with an experience of from five to six or eight months?

A. Oh no. No sir; no sir.

Defendant objected to the above question and answer and asked that its exceptions be noted of record, which is done.

234 Q. Do the railroad companies, in operating freight trains use their own cars altogether?

A. No sir, they use every kind of car shipped over their road.

Q. Do brakemen in performing their duties take notice of the different kinds of cars used by the railroad companies?

A. Not particularly, they don't. Of course they naturally notice a new car that comes through.

Defendant objected to the above as incompetent, irrelevant and immaterial and that the witness is not qualified to testify on the subject.

The court overruled the objections of the defendant, to which ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Q. In the discharge of their duties as brakemen do they stop to notice whether the car belongs to the company whom they are working for or belongs to a foreign company?

A. They never pay no attention.

Q. Or do they go ahead and pay no attention?

A. They pay no attention to who the car belongs to. On the road they just handle it the same as any other car. In fact it is none of their business.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. Mr. Hopson, when did you begin the railroad service as a brakeman?

235 A. Well, sir, I don't know the exact date.

Q. What is your age?

A. I am forty years old.

Q. Approximately what age were you when you begun service as a brakeman?

A. Well, let's see. When I first went to working on the railroad I suppose I was about twenty years old, or twenty-one, along there.

Q. What kind of work was your first work? Brakeman?

A. Well, I went to working on the railroad when I was about fifteen years old.

Q. The question I asked you was what kind of work was your first work? Brakeman?

A. No.

Q. What was your first work?

A. Call boy.

Q. When did you begin work as a brakeman?

A. Well, as I told you I can't give the exact date.

Q. Did you ever work as a brakeman?

A. Yes sir.

Q. For what company?

A. I worked for the T. P., the K. C. S., the Frisco and Cotton Belt. I never broke on the Cotton Belt; I switched on the Cotton Belt.

Q. Give approximately the year when you did your first work as a brakeman? What year?

A. I could give you the railroad, but the year I would have to go back home and dig around in my wife's trunk. She is dead and I don't know where the papers is.

236 Q. You have not the slightest recollection approximately of the year it was? Is that what you mean by referring to your wife's trunk and digging down into it?

A. I have got a kind of idea.

Q. Well, what is that idea?

Court: Give your best estimate.

A. Between '82 and '88.

Q. 1882 and 1888?

A. Yes sir.

Q. On what railroad did you begin work on as a brakeman?

A. On the Transcontinental.

Q. Where is that?

A. That runs out of Texarkana.

Q. What was your age when you began work on that railroad?

A. I don't know.

Q. Approximately what was your age as near as you can state at the time you began work as a brakeman on that railroad?

A. I suppose I was between twenty and twenty-two years old.

Q. How long did you work as a brakeman on that railroad?

A. Well, I was there a couple of years.

Q. Can you give the name of the conductor of any one of the conductors with whom you were working?

A. Yes sir, I broke for one named Whitledge.

Q. Now did you work as brakeman for any other railroad companies?

A. Yes sir, I broke for the K. C. S. here.

Q. Next after the road you mentioned in which you stated that you began as brakeman about 1882, next after that, for what road, if any, did you work as brakeman?

A. Well, I don't remember. I went in the yards from there, went into the Iron Mountain yards and worked I think a year or something.

Q. You were working as freight brakeman on the road you mentioned a while ago?

A. Yes sir, local freight; sometimes on a through freight.

Q. The next question I asked you was to name the road for which you worked next as brakeman?

A. I will tell you, I worked backwards and forwards and worked in so many yards I don't remember just—let me see. The next one I broke for was the K. C. S.

Q. What year did you begin braking for that company, or about what year? Give your best recollection of the year?

A. I don't know. You ought to have the records.

Q. If you don't know that, answer it.

A. I don't know, No sir.

Mr. McDONOUGH: I move to exclude his answer that "you ought to have the record."

Court: No, that is not material.

A. Well, the company keeps the records.

Mr. McDONOUGH: I move to exclude that reply.

Court: No, that is incompetent.

Q. Can you tell approximately within two or three years of the year that you went to braking for the Kansas City Southern?

238 A. No, I can't. I worked for them two or three times.

Q. When you first worked for them, approximately when was it?

A. I don't know. I can't say approximately.

Q. Was it in 1899 or was it in 1885 or 1886? You can't answer that?

A. I don't know what year to place it in.

Q. Where was it that you worked for the Kansas City Southern as brakeman?

A. Well, I broke on the Local from Wilton to Shreveport.

Q. About what age were you when you were braking on the Kansas City Southern from Wilton to Shreveport?

A. That was during my first work for the K. C. S.

Q. Was that after you had worked for the other railroad running out of Texarkana?

A. Yes, sir.

Q. Was it a year or two afterwards of four or five years afterwards? If you can't answer, say so, and we'll get along faster?

A. I don't remember, no sir.

Q. How many years altogether did you work for the Kansas City Southern as brakeman?

A. Well, I broke about a year the first time.

Q. How long the next time, if at all?

A. I guess I broke about a year the last time.

Q. You have worked then for the Kansas City Southern twice as brakeman?

A. Yes, sir.

239 Q. Each time, a year is your best recollection?

A. I think something like that.

Q. What is the time between the two times of working? Was it one year, two years, or ten years?

A. Sometimes you know I was out of work.

Q. Were you at any time continuously in the employ of the Kansas City Southern as brakeman for a year?

A. Yes, sir.

Q. What year was that?

A. I couldn't tell you just what year it was.

Q. When were you last in the employ of the Kansas City Southern as brakeman?

A. That has been about ten years ago I guess.

Q. At what place?

A. Braking from Shreveport out of there.

Q. What direction?

A. South, to Hornbeck, De Quincy and Lake Charles.

Q. Did you say you worked for the Cotton Belt as brakeman?

A. No.

Q. Did you work for any other road out of Texarkana as brakeman?

A. I worked for the Frisco here.

Q. Between what points did you work as brakeman?

A. I was all over it: between Ashdown, Ardmore and Hugo out

over there. I was brakeman about three months, and then they set me up as conductor, and I also run a train.

Q. That is what you mean by running a train, a freight train?

240 A. Yes, sir.

Q. How long were you in that service, the Frisco?

A. I don't know whether you could call them the Frisco or not. It was the A. C. Construction.

Q. Whatever road it was?

A. About two years ago.

Q. How long has it been?

A. It has been about twelve or fourteen years ago. Something in that neighborhood.

Q. How long have you been with the Iron Mountain in your present employment?

A. Right at ten years.

Q. What kind of employment is that?

A. Switchman in the yard.

Q. Night or day?

A. Day.

Q. Are you familiar with the refrigerator car known as the S. F. R. D. car?

A. Yes, pretty familiar with them. I have handled a good many of them, rode on a good many of them.

Q. What are those initials?

A. I think the Sante Fe Refrigerator Dispatch.

Q. Those cars belong to the Sante Fe system, don't they?

A. I don't know.

Q. A great many other lines handle them?

A. I think so. The Iron Mountain handles a good many of them.

Q. Where is the Sante Fe system?

241 A. It operates through Texas a good deal.

Q. Do you know where the Headquarters of the Sante Fe system is?

A. No.

Q. Do you know the size of that system as compared with the Missouri Pacific system or Iron Mountain?

A. No.

Q. Has the Iron Mountain, to your knowledge, any refrigerator cars like those of the Sante Fe?

A. I don't think the Iron Mountain owns a refrigerator car.

Q. Then, it has none of that kind. It has none to your knowledge?

A. No sir; at least I never saw one with the Iron Mountain on it.

Q. Are you familiar with the tank car known as the National Zinc Company car?

A. I never notice the initials on any of the tanks unless it is very plain.

Q. What kind of tank cars did you refer to in your direct examination?

A. I just referred to the majority of them.

Q. Well, what make?

A. Well, I never noticed any particular makes of them.

Q. How are those made you did refer to? Describe those you referred to and had in mind when you were answering Judge Feazel? State what kind of cars you had in mind, describing them to the jury?

A. Well, I considered the tank car only since they are
242 building the new cars.

Q. I am not asking about building cars. I am asking you to describe the cars when you were talking to him about hand holds and ladders, and so forth.

A. These small tank cars, the ones that are the most dangerous?

Mr. McDONOUGH: I move the Court to exclude that answer as not responsive to the question, and ask the rule on the witness to describe the cars.

Court: He says he is telling you the kind of cars he had in mind.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Court: Tell him what kind of cars you had in mind.

A. Well, I had in mind these common tank cars that looks like a platform with a tank on it.

Q. Is that an oil car you are speaking about or is that an acid car?

A. I don't know. Railroad men call them all tank cars.

Q. Do you know the difference between an acid car and an oil car?

A. Well, in the construction of them there is very little difference.

Q. All tank cars, then, are constructed substantially alike? Is that what you mean?

A. I don't mean they are all constructed substantially.

Q. Give the description of the tank cars you had in mind?

A. Well, that is what I was trying to do. The cars that is small and couldn't reach the railing of them good are the
243 ones I had in mind. I don't know the initials of the cars all of them because I never noticed them.

Q. Mr. Hopson, can you name any tank car, giving its name that is in use by the railroads in the Southwestern country?

A. Yes, sir.

Q. Well, name one?

A. The Gulf Refining Company is a new car that came out and the Tulsa Refining Company.

Q. What kind of car is the Gulf Refining Company car? Is it an oil tank car?

A. I don't know whether they hold oil in it but we always call them tank cars.

Q. Describe the cars, the Gulf Refining car now?

A. I couldn't tell you exactly how they are constructed now.

Q. Give your best effort to describe that Gulf Refining car?

A. Well, I never noticed the description of it very much only just a big sign on the side of it.

Q. Got any hand rails on it?

A. Yes, sir.

Q. Is it a second-story car?

A. I don't think it is. I don't think it is a double-story car.

Q. Has it got a hand railing around it?

A. I don't know.

Q. Has it got a walk way upon the car high upon the tank?

A. Well, I don't remember.

Q. When you spoke of that car is it the car that has got a hand railing about half way up that is fastened to the body of the tank itself?

244 A. I don't know. They are constructed in so many ways.

Q. Has it a walk way on a level with the bottom of the tank?

A. That is the same question that was asked before?

Q. You don't know?

A. No, I don't.

Q. Has it a walk way on the upper side of the tank?

A. That is pretty near the same as the other one.

Q. Has it any ladders, grab irons, or hand holds at the side of the car?

A. They are all supposed to have them.

Q. I am not talking about that. I am asking you from your personal knowledge, this Gulf Refining car? You don't know?

A. No sir.

Q. Now, can't you name any other car in the service of this Southwestern country or in the United States?

A. I could probably think of some names of them but I don't remember how they are constructed.

Q. Can you name any others?

A. No, not right at present. In fact the names of them never bother me in my business at all.

Q. You can't name any of them you say?

A. No, I can't.

Q. You are not familiar with the National Zinc car?

A. No sir.

Q. You don't know the size of that car?

A. No, I don't know the exact size of it.

Q. You don't know what kind of hand rail it has?

245 A. No sir.

Q. Nor you don't know what kind of walk way it has?

A. No, I don't.

Q. Do you know the reach of your own arms from hand to hand, your arms extended horizontally to your body in opposite directions? I am speaking of yourself individually. Do you know how far you reach?

A. No, not exactly.

Q. Well, about how far?

A. I should judge about four feet and a half or five feet.

Q. Your arms are at least two feet long, aren't they?

A. Yes, I suppose they are.

Q. Then your two arms would be four feet?

A. Yes.

Q. Now, what is the width of your body? It is a foot and a half or two feet, isn't it?

A. Yes, I expect it is.

Q. Then your arms four feet and your body a foot and a half or two feet would make five feet, wouldn't it?

A. Yes, I expect it would.

Q. You didn't know Mr. Old, did you?

A. No sir.

Q. You didn't know his reach?

A. No sir.

Q. Are you a member of the Trainmen's Order or union of any kind?

A. Yes sir, I belong to the B. of R. T. Brotherhood of Railroad Trainmen.

246 Q. The same as the brakemen belong to?

A. Yes sir.

Q. In speaking of the danger going from the box car, what is that danger?

A. Going from the box car?

Q. Yes, you spoke about a box car in answer to Judge Feazel's question?

A. He spoke about a low car.

Q. Did you say anything about the danger of going from a box car to an oil car or tank car?

A. Yes, it is dangerous going around any low car; that is, if you are going around the side.

Q. It is dangerous in going from one car to another, regardless of what kind of attachments or appliances on there, isn't it?

A. Yes, but it is more dangerous climbing around.

Q. That is because you have to reach further?

A. Yes, and because you are in an awkward position.

Q. The position is lots more awkward to go around the end than it is to go around from end to end, isn't it? In going from end to end you come down on the car, don't you, if the ladder is on the end of the car?

A. Yes, sir.

Q. Then, if the ladder is on the end of the next car where you are going you have to turn around in the car, don't you holding to the hand holds on the end of the car you are on with your face to that and then when you get ready to catch the car behind you you have got to turn around and catch that car holding yourself suspended between the two cars, don't you? Is that right?

247 A. Yes, you have to turn around, of course.

Q. Now, if you are going from where the hand hold is on the side

of the car, and you say it is within three or four inches usually from the end of the car, in going from that you come down with your face to the side of the car, don't you?

A. Yes, sir.

Q. Then, you place your feet near the end of that ladder or hand hold and then you don't change your face or change your position in the air but extend across the other car with your foot?

A. Yes, sir.

Q. But you don't turn in the air going from the ladder on the side to another car whether it be an oil or tank car, do you?

A. No, you don't turn completely around.

Q. And if you reach as much as five feet and the cars are only two and a half feet apart you have two or two and a half feet of play in which you can go from one car to another? Isn't that true?

A. Yes, sir.

Q. In going from one car to another you can step as much as five feet, can you not?

A. That is a pretty long step: five feet.

Q. Well, you can step four feet, can't you?

A. Yes, sir.

248 Q. If you come down the end ladder on the end of the car—I mean on the side of the car—if there is no ladder on the end of that car you will find a hand hold on the end of that car about eighteen to twenty inches above the coupling appliances, will you not?

A. Not always. Some of them have two grab irons.

Q. One or two?

A. Yes.

Q. Then there is always one or two on the end of the refrigerator cars?

A. I don't know that they are always on the end.

Q. Isn't it true that every refrigerator car in service, if it has the ladder down the side near the end that it has a hand hold within reaching distance of your hand or foot on the end and about eighteen to twenty inches above the coupling appliances?

A. Yes, they have a hand hold.

Q. What is that for? What is that hand hold or foot ladder for?

A. It is supposed to grab to for safety.

Q. You can put your foot on it, can't you?

A. Yes, sir.

Q. And go from one car to another, or you can put your hand on it?

A. Not very well, no sir, going from one car to another.

Q. Then, if you couldn't put your hand on that how could you use the end ladder?

A. Because the end ladder is up here in proper height to you.

49 Q. So the side ladder is the same height as the end ladder, isn't it?

A. Yes, usually.

Q. The only difference is with the end ladder you have to turn yourself around and in the side ladder you step across sideways?

A. You don't have to turn completely around on the end ladder.

Q. You don't have to turn completely around, but you have to turn half around?

A. Yes, the same as you do the other way.

Q. If it is two box cars that are close to each other you don't go down this ladder at all, do you?

A. No sir.

Q. You step from one to the other?

A. Yes.

Q. It don't take a brakeman long to find that out, does it?

A. No sir.

Q. You mean to say when you are on top of a box car or a refrigerator car when you get to the end that you can get to the other car?

A. Yes sir, if they are both box cars, yes sir.

Q. Will it take a man a year to learn about that crossing over there?

A. No, not that particular thing.

Q. Now, if a man comes down the side ladder is there any reason why he can't see what he has got to catch on to and learn about the dangers that are incident to them?

A. Yes, but them things are not always constructed in the same place.

Q. All hand holds of the S. F. R. D. cars are all in the same place, aren't they?

A. I don't know that they are. It is a very common thing to find a car with a hand hold running kind of catty-cornered.

Q. Hand holds on the S. F. R. D. cars? Don't you know you can't find an S. F. R. D. car that has got any hand holds or ladders running diagonally up the cars?

A. It is according to the man that puts it on there.

Q. I asked you if you knew of any?

A. No.

Q. Now, if a man works one day as brakeman in going up and down various kinds of cars in passing from one car to another, from an oil car to a refrigerator car, and from a refrigerator car to an oil car is there any reason why he couldn't have experienced and learned about how far he would have to go and how he would have to go?

A. He will learn it if he keeps on. He will learn it if he has got luck and keeps on after while.

Q. But you said it would take a year and a half or two years for a man to learn the dangers. Isn't one day enough for a man to learn the dangers right before his eyes?

A. No, he couldn't learn it.

Q. If a man passes from a refrigerator car—that is the only car I want to ask you about, the S. F. R. D. refrigerator car—to an oil tank car and realizes he has to make a reach of something like five feet or four and a half or four feet or three and a half, wouldn't he learn from that one experience whether it was or was not dangerous?

A. No, I don't think he would.

Q. Why?

A. Because he is young and ambitious and wants to go and takes a chance.

Q. The reason he doesn't learn is because he is inexperienced and willing to take a chance and does take a chance?

A. Well, he couldn't get along with the conductors unless he—

Q. I didn't ask you that.

A. I don't just understand what it is you want me to say.

Q. I am asking you why it is a young man passing from one car to another one time doesn't realize how far he has to step or reach with his hand? What is there to keep him from learning that distance and that danger?

A. Just the lack of experience is all I know.

Q. It is dangerous for a brakeman that has been working twenty-five years, isn't it?

A. Yes, but a man of that experience won't take chances like that.

Q. He does take them more than a younger one? Isn't that your experience?

A. No, that is not my experience.

Q. If there were ladders on the ends of each car it is still dangerous to go from one to the other, isn't it?

A. Yes sir, it is dangerous anyway you take it.

Q. Railroadroading is dangerous in every department of it, isn't it?

252 A. Yes sir.

Q. And brakemen know that when they go in the service?

A. Some of them do and some don't.

Q. Any man of common ordinary sense knows its dangers?

A. Yes sir.

Q. In driving a wagon he is liable to get run over?

A. He is liable to fall too.

Judge FEAZEL: I think Mr. McDonough has gone along that line for enough.

Court: Yes, I think so.

Mr. McDONOUGH: I save an exception. The witness is put on the stand as an expert, and I should have the right to examine him further to show his want of knowledge.

Redirect examination.

Questions by Judge FEAZEL:

Q. Now, Mr. Hopson, you kept insisting all the time while you were being cross-examined on explaining what you meant to Mr. McDonough, but he never gave you any opportunity—

Mr. McDONOUGH: I desire to move to exclude that remark of counsel and I save an exception to it being made before the jury.

Court: The jury is trying this case on the testimony introduced.

Q. The explanation you wanted to make—assuming these are the two cars (indicating), this is a high car and this is a low car (coun-

sel uses books to illustrate). Now explain to the jury the dangers that you spoke of in going from a high car to a low car where you only have side ladders?

253 A. What I was trying to tell, in coming over the end ladder down there he wouldn't stand like he says and then have to turn around that way.

Q. How would you do?

A. I would go down my ladder with my back to the other car—

Q. You mean your side to the car then?

A. Yes sir, would have just a good straight step over and catch.

Q. Is it not true, if you were going down the ladder on the end of the car when you went to swing to make your step the weight of your body would press against the end of the car?

A. Yes sir, in coming along, yourself, in actual position and the cars going, it jostles you like that and you are reaching for something else, low joints or low track may cause a jerking and throw you over and overbalance you and wedge you between the cars, the hand hold on the side of the car and you are standing on the side position your feet could slip easily and slip off. On the end ladder there is a foundation behind you and in stepping straight across you wouldn't slip and the body of the car would catch you.

Recross-examination.

Questions by Mr. McDONOUGH:

Q. Mr. Hopson, you would have to turn half-way around to get from one car to the other?

A. Oh, yes.

Q. You would either have to step side-ways, backwards or forwards, in making that turn?

254 A. You wouldn't have to step backwards.

Q. How would you step, forward or side-ways?

A. If I wanted to I would turn this way (indicating) and step straight on the car.

Q. Are you speaking of hand holds between the two cars?

A. Yes sir.

Q. They are the hand holds between the two?

A. Yes sir.

Q. Now, if one of them is a tank car which never had any hand hold, and is never made with a hand hold, then there would be no advantage end hand holds on the refrigerator car next to the tank car. If the tank car is not of the type or make that ever had a hand hold or an end ladder, and if there never was and never could be an end ladder on the tank car, then there could be no advantage in having an end ladder on the refrigerator car next to it, would there?

A. Well, no, it wouldn't for me.

Q. Now, in illustrating before the jury how you would go from on- to the other, you had in mind two cars, each of which had hand holds on the end, didn't you?

A. Yes sir, it had a hand hold on the end; not a mere hand hold, but ladders.

Q. Anything to catch to?

A. Ladders I am speaking about.

Q. Well, what you want to call it, there are several hand holds?

A. You mean the ladder by itself?

Q. I mean the hand holds that constitute the ladder. Are those what is the ladder?

255 A. A ladder is a continuance of hand holds, just the same as a ladder.

Q. In describing those refrigerator cars, did you mention about a step or a foot step that is down right under the refrigerator car?

A. I never say one on the inside of the car. I never saw one on the inside of the car. It was always on the outside at the end.

Q. What is the purpose of that step?

A. That step is for you to stand on there.

Q. In going up and coming down?

A. Yes sir.

Q. It is the last step you would use in coming down and the first step you would use in going up?

A. Yes sir.

Q. And it is a step you would use in going from the side of one car to the side of the other car?

A. Yes; that is, I would use it if there was no other way to get over it. If that was the only one there the chances are I would use that.

Q. You never saw one at the end?

A. I don't remember of seeing stirrups at the end of the car on the inside between the cars.

Q. It is a metal concern that is in the shape of a—

A. It generally hangs down like a stirrup.

Q. It is attached to the flat surface of the inside of the car and then runs down six or eight inches and then up and attaches to the car again, and that is what you mean by the stirrup?

256 A. Yes sir.

Q. That, you do not find at the end of the car?

A. No sir.

Q. Even at the cars where there is an end ladder you don't find that step at the end?

A. No sir.

Q. There is a good deal of lumber hauled in this country, isn't there?

A. Yes sir.

Q. Isn't it dangerous to have the ladders on the end of the car because of the fact that lumber may become uneven and make it dangerous for brakemen passing down the ends of the cars?

A. No, not particularly.

Q. Isn't it true, the majority of railroads in the southwest have their ladders on the side of the car because they have more space and room for a brakeman to work there than between the cars?

A. No, I don't think it is.

Q. Isn't it true, in the eastern part of the United States where

land is not so plentiful and space is more confined they have their ladders on the end?

A. They nearly all do, yes.

Q. And the systems in the south and southwest generally have them on the side?

A. They are putting them on the end.

Q. I didn't ask you that?

A. No sir, not generally.

Q. Don't the majority of them?

257 A. No sir.

Q. I mean this, say, this is the front of the car, this table, this going north, the place you find the hand holds would be on the north end and right hand side facing north?

A. Yes, if it was going north.

Q. The same way you have had hand holds on the other end or side near the end on the right hand side facing south?

A. That is right.

Q. If a man passes or gets on the hand hold or ladder that is on the end of the car he is more nearly over the wheels than he would be if he is on the side, isn't he?

A. Yes, but he is in a better position.

Q. I never asked you that. But he is nearer the wheels?

A. He is standing over the wheels, yes sir.

Q. If he uses the end hand holds and he happens to make a misstep or a mis-catch between the cars he will go right down between the rails, won't he, and likely be run over or be caught on the coupling appliance?

A. Yes, if he falls down.

Q. If he falls on the outside, using the outside ladder he is not so likely to fall under the wheels and be run over, is he?

A. Well, he will fall and hit the ground. He would probably fall inside, probably his arms or something.

Q. You mean to say, a man in falling from the outside ladder when that is two or three feet from the rails would fall beyond the rails or would fall this side of the rails?

A. It is according to how he falls.

258 Q. Assuming he falls straight down, would he fall inside the rails or outside the rails?

A. If he fell straight down he would fall outside.

Q. If he attempted to pass from a refrigerator car to an oil car and fell straight down he would be clear outside the rails and outside the wheels, wouldn't he?

A. If he fell straight down, he would. Yes sir. He would certainly fall outside.

Q. Do the National Zinc Company cars have the outside step, step at the end similar to the step on the refrigerator car?

A. I couldn't say that because there ain't hardly any cars with the same kind of step.

Q. You don't know?

A. They have a step but I don't know what kind.

Q. Do you know the distance from the hand hold or ladder on

the end of the S. F. R. D. car to the step or hand hold on the National Zinc Company car when the two are properly coupled together?

A. No, I do not.

Redirect examination.

Questions by Judge FEAZEL:

Q. Mr. Hopson, is it not true, a great many cars have both side and end ladders?

Mr. McDONOUGH: That is objected to as leading.

COURT: That is leading.

Q. Please state whether or not nearly all refrigerator cars have both end and side ladders?

259 Mr. McDONOUGH: Objected to for the same reason.

COURT: Go ahead.

Defendant at the time excepted to the ruling of the court.

A. Well, not all of them.

Mr. McDONOUGH: Objected to for the further reason the only refrigerator car in controversy is the S. F. R. D. car.

Court overruled defendant's objections and defendant saved exceptions.

Q. Is it not true the majority of the refrigerator cars have both, end and side ladders?

A. Yes, the new refrigerator cars they are bringing out they are equipping them both ways.

Mr. McDONOUGH: Objected to for the reason it is not competent or relevant.

COURT: Go ahead.

Defendant excepted to the ruling of the court, and asked that its exceptions be noted of record, which is done.

Witness excused.

260

Testimony of R. E. Lee.

R. E. LEE, having previously been sworn, is recalled by the defendant for further cross examination, and testified as follows, in response to questions propounded by Mr. McDonough:

Q. You live at De Queen?

A. Yes, sir.

Q. You are in the employ of the Kansas City Southern?

A. Yes sir.

Q. Are you in their employ now?

A. Yes sir.

Q. What is your run?

A. I am on the Local now between Heavener and De Queen.

Q. When were you last in the employment of the company?

A. Yesterday.

Q. You have been a brakeman on the line?

A. Yes sir, and extra conductor.

Q. Have you ever worked as brakeman for any other railroad?

A. Yes sir.

Q. What road?

A. Why, the T. P. and the Cotton Belt and the Iron Mountain.

Q. What do you mean by the T. P.?

A. Texas Pacific.

Q. How long have you been in the employ of the Kansas City Southern at this time?

A. For the past five years.

Q. Where has your run been?

A. Out of Mena, Heavener and De Queen.

Q. You gave your testimony last Saturday I believe?

A. Yes sir.

Q. Or Friday?

261 A. Yes.

Q. In this case?

A. Yes sir.

Q. Now, in that testimony you referred to the box or refrigerator car as I remember. Which did you refer to or have in mind in giving your testimony; a box car or refrigerator car?

A. I believe I was asked about a box car.

Q. You were also asked about a tank car, were you not?

A. Yes sir.

Q. Describe the tank car that you had in mind in giving your answers?

A. I was asked about several different kinds of tank cars.

Q. Are you sure of that?

A. I believe I was, yes sir.

Q. Well, describe the tank cars you had in mind?

A. I was asked about one I had in mind was like the Glenpool or Midland Valley tank.

Q. What kind of car is that?

A. That is what I call the platform of the car, ladder extending up to the end of the car with a running board on top and then a hand railing up above that.

Q. What is the length of that car?

A. Well, there is different lengths, I believe. I am not sure.

Q. You don't mean to say different lengths of that same make, do you?

A. I would think the car is about thirty-four feet.

Q. What is the dimensions of the tank of that car?

A. I can't give you that, I don't know.

262 Q. What is the length from the outside frame of one—
what is the length from the outside frame on one side to the
outside frame on the other? What is the width of the car, in other
words?

A. It is about the same width as the ordinary box car.

- Q. Give it in feet as near as you can?
- A. I don't know that I could give you the exact distance of the car.
- Q. What is the distance between the rails on the standard?
- A. About four feet, eight inches, something like that.
- Q. You say four feet, eight or four feet, nine?
- A. I said some near four feet, eight the best of my memory.
- Q. How much, if any, does the frame of the Glenpool oil car extend beyond the rails?
- A. Just about the same as the box car would.
- Q. What is that?
- A. I don't know the exact inches.
- Q. Approximate it. Give your best judgment as to what it is.
- A. About two feet.
- Q. I want to see if I get your view. That would make the width of the Glenpool or Tank car about 12 feet, 8 inches?
- A. No sir, it wouldn't be that wide, would it?
- Q. That is right, I made a mistake. Eight feet, eight inches.
- A. That is about it.
- Q. Now, isn't that tank car in the neighborhood of twelve feet from one side to the other?
- A. No sir, I don't think so.
- Q. You think it is in the neighborhood of eight feet, eight inches?
- 263 A. Something like that.
- Q. That Glenpool car has a tank of about what diameter, the distance through the tank.
- A. About six feet, I have an idea, is my estimate.
- Q. Doesn't the tank extend out as far as the side of the frame of the car?
- A. Not quite.
- Q. Isn't it true it extends so close to it that there is no room for walkway or pathway on that Glenpool car except on top or near the top?
- A. Yes sir.
- Q. The only place to put a walkway on that car because of the size of the tank is near the top of the tank?
- A. Yes sir.
- Q. In order to get up to that top it is necessary to have a ladder there at the end or on the side?
- A. Yes sir.
- Q. Those are the cars that you found the ladder on?
- A. Yes sir.
- Q. Are you familiar with the tank car known as the National Inc Car?
- A. I have saw them and worked with them.
- Q. Are they smaller or larger than the Glenpool car?
- A. Smaller.
- Q. Much smaller, aren't they?
- A. Much smaller.

Q. The tank of the National Zinc Car is smaller?

A. Yes sir.

264 Q. It is not as long as the frame work of the car?

A. No sir.

Q. Nor as wide?

A. No sir.

Q. A National Zinc car, isn't it true there is plenty of room for a walk way along the side of the tank from one end of the car to the other?

A. Yes sir.

Q. On that car the walk way is constructed that way, is it not on either side of the tank and right on top of the frame work of the car and not upon the top of the tank?

A. No, it is on the floor of the car.

Q. Outside of that railing state whether or not there is a railing on that Zinc car?

A. Yes sir.

Q. How far does that railing extend as to the end of the car? The question that I ask you, to make it more intelligent: state whether or not that railing goes beyond the end of the tank at each end of the car?

A. I don't believe it does.

Q. You haven't looked at one lately, have you?

A. I haven't paid any particular attention to one lately.

Q. Isn't it true that the railing goes into the post at the extreme end of the frame work in that car?

A. Yes sir.

Q. Isn't the tank some two and a half feet shorter than the frame work of the car?

265 A. Yes sir.

Q. There is no end railing going across to correspond with that side railing, is there? End railing going across the end?

A. No sir.

Q. If a railing was there it would be in the way of getting on that walk way, would it not?

A. It would have to be stopped there.

Q. That would add to the exercise to be put forth by the trainman or brakeman in going over it, wouldn't it?

A. Yes sir.

Q. This National Zinc car had a hand hold on the end sill, hasn't it?

A. I believe it has.

Q. How many of these hand holds on each end?

A. I don't think more than one.

Q. Aren't there two?

A. On the sill of the car?

Q. Yes?

A. Well, there is one on the end and one on the side.

Q. Well, aren't there four of those hand holds, one on the end and one on the side at each end, making six altogether?

- Q. Well, there is one on the corner of the car.
- Q. Isn't there one on each corner?
- A. Well, I believe that is right.
- Q. And if you take, say, the north end of the car or the south end of the car on the National Zinc car and looking south, isn't it true the grab iron or hand hold on the left end sill and also hand hold on the right?
- 266 A. I don't believe I understand just what you are——
- Q. Isn't it true that looking south at one of those cars that there is a hand hold on the right end sill and also a hand hold on the left end sill?
- A. I believe there is.
- Q. Isn't there a step on the left hand side, underneath the frame work of the car at the end?
- A. Yes sir.
- Q. Now, if you attempt to pass from a refrigerator car—S. F. R. D.—you knew what car that is?
- A. Yes sir.
- Q. —that had no end ladder, that is end ladder on the end parts out a ladder on the side within three or four inches of the end, how would you pass from that refrigerator car to a National Zinc car that is a little north of it? Suppose you were trying to go from a refrigerator car, the Santa Fe refrigerator car to the National Zinc car, how would you pass from one to the other?
- A. I would have to go down the side ladder and step over it.
- Q. What is there on the refrigerator car, if anything, other than the ladder that will enable you to go across?
- A. Well, there is generally a hand hold on the end of the car.
- Q. How far above the bottom of the car is that hand hold usually placed?
- A. Well, in different places.
- Q. Usually on those Santa Fe refrigerator cars?
- A. I don't know whether I can recall on those Santa Fe refrigerator cars.
- 37 Q. Do you know whether on the Santa Fe refrigerator cars this end hand hold where there is a side ladder is usually about the same place?
- A. I don't remember particularly about the S. F. R. D. car.
- Q. Well, I am not asking you about any other. Is it or is it not true that there are two hand holds on the end, one on either side?
- A. On some cars.
- Q. I am speaking now of the refrigerator car. If I mention anywhere I will ask you about it. All my questions are directed now to the Santa Fe Refrigerator car. What is your recollection as to whether there is one or more than one hand hold on the end of all those cars where the ladder is on the side.
- A. I can't recall the S. F. R. D. car to say positively.
- Q. What was your statement on Friday as to whether or not it is dangerous to pass from a box car to an oil car, as to whether or not it was safe or dangerous or more safe or less safe? I don't re-

member what you said about it exactly. I remember you were examined upon it but I don't remember what your statement was?

A. I don't know that it is any more dangerous in going from an oil tank than any other low car.

Q. Isn't it less dangerous to go from a Santa Fe refrigerator car to a National Zinc car than it is to go from a refrigerator car to a coal car?

A. I don't know that it is.

Q. Aren't the ends of the coal cars more difficult to climb
268 into than it is to climb to the platform of a National Zinc car?

A. You would have to climb over the ends of the coal car.

Q. Isn't it true that the National Zinc car is one of the easiest cars to get onto from any other kind of car?

A. I don't know that it is any easier.

Q. But it is no harder?

A. No sir, I don't know that it is any harder.

Q. Isn't it true, Mr. Lee, that if the refrigerator car had an end ladder and the brakeman should attempt to use the end ladder, that on a railroad where a great deal of lumber is placed on open cars, on flat cars, isn't it true he is liable to be hurt by lumber sticking out and jabbing him or injuring him as he goes down the end of the ladder? Of course, assuming that there was a lumber car of that kind there next to him?

Judge FEAZEL: What is the purpose of this?

COURT: I presume that would tend to show there was no negligence in not having end hand holds.

A. Why, not if it was a proper load of lumber.

Q. But if the load of lumber should become uneven it would become dangerous.

A. It would.

Q. There is a great deal of lumber hauled on the Kansas City Southern railroad, isn't there?

A. Yes sir.

Q. A great deal of it hauled in open flat cars?

A. Yes, sir.

Q. With standards on the sides?

A. Yes sir.

269 Q. Isn't it more difficult or more dangerous to go from refrigerator cars with end hand holds to a flat car loaded with lumber than it is to go from a refrigerator car with side ladders to a National Zinc car?

A. I don't know that it is.

Q. Is there anything on the flat car loaded with lumber to catch onto, other than the grab iron on the end sill?

A. Unless it would be the load of lumber itself.

Q. A load of lumber is a very difficult thing to catch onto, isn't it?

A. Some of them are and some are not.

Q. Describe some of those that are difficult?

COURT: That is rather getting a good piece away.

Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. Some of them are more dangerous than to go from a refrigerator car to a National Zinc car?

A. Yes sir.

Q. It is because there isn't anything to catch hold of, isn't it?

A. Yes sir.

Q. Mr. Lee, did you ever work in the eastern part of the United States?

A. No sir.

Q. You have seen a great many Eastern cars in this part of the country, have you not?

A. Yes sir.

Q. As a rule, aren't the cars from the Eastern part of the United States, such as the New York Central, Pennsylvania, New York, New Haven & Hartford, aren't those cars you see out here usually have ladders on the ends?

A. As a rule?

Q. But it is true that the cars in the Southwestern railroads and Western railroads usually have hand holds on the side as a rule?

A. You will find them both ways.

Q. I know you will find them both ways, but the majority is on the sides in the Southwestern and Western railroads?

A. Yes sir, on the side of the cars.

Q. The reason that you expressed the opinion to Judge Feazel that it was safer to pass from the end of one car having end hand holds to the end of another car with end hand holds, was what?

A. It would be a shorter step.

Q. There are other dangers to be met with in passing from the end ladder of one car to the end ladder of another car, are there not?

A. Nothing unusual.

Q. Mr. Lee, isn't it true one of the things you first learn in railroading that in performing your duties you should not go between the ends of the cars either on the ground or on the cars unless there is no other ways to perform your duties?

A. Are you speaking of high cars?

Q. High cars or any other kind?

A. I do not mean a low car.

Q. What kind?

271 A. A coal car or flat car or tank.

Q. The low cars vary greatly in their make-up, don't they?

A. Yes sir.

Q. And as to the hand holds that are on them?

A. Yes sir.

Q. Some of them have ladders and some do not?

A. Yes sir.

Q. Do any of the low cars have ladders?

A. Yes sir, coal cars.

Q. Those coal cars, they have ladders where they have drop ends are more dangerous than tank cars, aren't they?

A. Yes sir.

Q. The step is longer there, isn't it?

A. I don't believe I understand you?

Q. Isn't the distance between, say a refrigerator car and a coal car with a drop end, isn't the distance longer there than between the Santa Fe refrigerator car and the National Zinc car?

A. I don't think so.

Q. You haven't measured it?

A. No sir.

Q. Your attention hasn't been called to that matter?

A. Not particularly.

Q. Now, to refresh your memory, I will ask you if you do not recall when you handle coal cars the distance is greater between the ends of coal cars than most any other kind of cars?

A. I don't think so.

272 Q. In passing down the end ladder, if a man should fall he generally will fall between the tracks won't he?

A. Yes sir.

Q. And that is dangerous?

A. Yes sir.

Q. He might fall on the coupling appliances?

A. Yes sir.

Q. Then from that to the track, might he not?

A. Yes sir.

Q. If he is using the outside ladder near the end, if he falls ordinarily straight down, he won't go under the wheels, will he?

A. Not likely.

Q. In that respect it is safer to have the ladders on the side?

A. In that respect.

Q. And the only respect in which it is safer to have the ladders on the end is that it is less distance to step?

A. Yes, you have an advantage in making a step.

Q. Now, in making that step, you have to partially turn around, do you not?

A. Yes sir.

Q. Then you have to turn your face and look, don't you?

A. Yes sir.

Q. That adds to your difficulty and danger, doesn't it?

A. I don't know that it does.

Q. If you are passing from one side ladder to another side ladder you don't have to turn your body? You simply have to turn sideways, isn't that true?

273 A. I would in going over trains.

Q. I mean in going from a side ladder to another side ladder on the side of the car you do not have to turn your body to look do you?

A. No.

Q. You step sideways, do you?

A. Yes sir.

Q. Ordinarily a man can step in that way, what distance?

A. Three or four feet.

Q. Mr. Lee, isn't it true, a man, even of your height, can reach with your feet, as much as five feet without letting loose of that car? In other words, that you may understand me, isn't it true that you might have your left foot on the right hand end of the ladder, step on one car, and at the same time reach the other car as much as five feet away and have both feet on hand holds that are five feet apart? Isn't that true?

A. I don't believe he could and make the step from one car to the other.

Q. Aren't my toes as much as five feet apart now? (indicating.)

A. They look to be.

Q. Did you know Mr. Leslie Old?

A. Yes sir.

Q. Wasn't he a rather tall man?

A. Yes sir.

Q. Long arms?

A. Yes sir.

Q. Do you know how far he could reach, approximately?

A. No sir, I don't.

274 Q. Wouldn't his arms enable him to reach as much as six and a half feet from hand to hand?

A. I couldn't say.

Q. He was a man with broad shoulders, wasn't he?

A. Yes sir.

Q. And long arms?

A. Yes sir.

Q. He was in the neighborhood of six feet tall, wasn't he?

A. Something like that.

Q. How tall are you?

A. Five feet, eight inches.

Q. How far is your reach from hand to hand when your hands are extended horizontally?

A. I don't know.

Q. Approximately, how far?

A. I never measured them.

Q. Will you hold up your hands horizontally, and approximate it yourself?

A. About four feet. (indicating)

Q. Don't you think your reach is more than four feet?

A. It may be.

Q. Your body is a foot and a half, at least, isn't it?

COURT: It seems to me those are matters that the jury can understand as well as this witness can.

To the ruling of the court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

Witness Excused.

R. Y. SECREST, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows, in response to questions propounded by Judge Feazel:

Q. Where do you live, Mr. Secrest?

A. Texarkana.

Q. What business are you engaged in there?

A. Switching.

Q. For what railroad company?

A. Iron Mountain.

Q. How long have you been so engaged?

A. Nine years.

Q. Had you ever had any experience in the train service before you went to the Iron Mountain?

A. Yes sir.

Q. How much experience have you had in your line in your life, train service?

A. All told?

Q. Yes.

A. About ten years.

Q. In what capacity now have you worked?

A. Freight brakeman, switchman, engine foreman and yard service.

Q. What are the duties of a yard switchman?

A. To make up trains, to break up trains, to do industry work.

Q. Please state whether or not, in performing those duties, he learns the duties of a brakeman of a freight train?

A. Yes sir.

276 Mr. McDONOUGH: Objected to as not competent or relevant or material.

Court: Go ahead.

Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. Will you please state to the jury what railroads you have worked for during the ten years' experience you have had?

A. Cotton Belt, Iron Mountain and Kansas City Southern.

Q. Will you please state to the jury what appliances, if any, the railroads operating trains in this territory, have on the ends of the cars; that is, box or refrigerator cars? A box car and a refrigerator car is something on the same order, are they not? They are called house or box cars, are they not?

A. Yes sir.

Mr. McDONOUGH: Objected to as incompetent.

Court: Go ahead.

Defendant excepted to the ruling of the court.

Q. What appliances do they have on the ends of the car to assist a brakeman in passing from the top of a box or refrigerator car onto

the platform of a low car where the floor of the low car constituted that platform or walkway?

Mr. McDONOUGH: Same objection.

Court overruled defendant's objections and defendant saved exceptions.

A. They have end ladders, grab irons, foot-steps.

Q. About what proportion now of the refrigerator cars in use in this country have these end ladders or hand holds you speak of?

277 Mr. McDONOUGH: Same objection.

Court overruled defendant's objection and defendant excepted.

A. About sixty per cent, or possibly more, in my opinion.

Q. What appliances, if any, along that line, do tank cars usually have to assist the brakeman in passing from one end to the other?

Mr. McDONOUGH: Same objection.

Court overruled defendant's objections and defendant excepted.

A. They have grab irons. Some of them don't; some of them have end ladders up to the running board.

Q. Those that do not have grab irons do they have anything like a railing around the end?

A. Yes sir, they have a railing around the platform.

Mr. McDONOUGH: Objected to as leading.

Defendant's objections are overruled and defendant excepted.

Q. Now, Mr. Secrest, in passing from the top of a refrigerator or box car to the floor of an oil car or tank car, would it not be safer, in your opinion, to have those end ladders or grab irons for the brakeman to go down than to have what is known as side ladders?

A. Yes sir, I think so.

Q. Will you please explain to the jury fully, why, in your opinion, you think it would be safer?

A. In the first place, a man coming down off the top of a refrigerator car or a box car, it is much easier to get down the end ladder than it is the side ladder and swing around to get on the platform or tank.

278 Q. Please state whether or not, in coming down the side ladder to get on the floor of a low car it would throw you in an *awkward* position in order to make the step or jump, as the case might be?

Mr. McDONOUGH: Objected to as leading.

Judge FEAZEL: Well, as an expert, we have a right to ask him leading questions.

COURT: I don't think that that would especially entitle you to ask it in such a way.

Q. Explain that difference in making that passage, what advantage the end ladder would be over the side ladder, if any?

A. Well, the distance wouldn't be so far to step from one car to the other. In coming down the end ladder and stepping across to the tank it is not as far as it is to come down the side ladder and swing around and step across.

Q. Now, can you think of any other advantage it would be? Are those side ladders generally put on the car perpendicularly or horizontally?

A. Horizontal.

Q. How far are they generally from the end of the car?

A. About four inches or four inches and a half.

Q. Now then, suppose a man comes down from the ladder on the side and he has got to step forward, is there anything on the rounds of these ladders to keep his feet from slipping back?

A. No sir.

Q. Would there be on the end ladder?

279 A. The end of the car would be that.

Q. Then, with the end ladder, one of experience to make his step he naturally throws his weight back behind him?

A. Yes.

Q. And the end of that car would keep your foot from slipping?

A. Yes sir.

Defendant objected to the above question as leading, the court overruled its objections and defendant excepted.

Q. What length of service, in your opinion, would it take a man of ordinary intelligence to become an experienced brakeman?

A. From three to five years.

Mr. McDONOUGH: Same objection.

Court overruled defendant's objections and defendant excepted.

Cross-examination.

Conducted by Mr. McDONOUGH:

Q. Mr. Secrest, do you live in Texarkana, Texas, or Texarkana, Arkansas?

A. Arkansas, Miller County.

Q. Do you belong to the Order of Railway Trainmen?

A. Yes sir.

Q. The same that the brakemen belong to?

A. Yes sir.

Q. You have lived at Texarkana how long?

A. Since 1902; eleven years.

Q. You work in the switch yards?

A. Yes sir.

280 Q. That duty calls you to switch a great many different kinds of cars?

A. Yes sir, all kinds.

Q. That is, all kinds of tank cars?

A. Yes sir.

Q. All kinds of box cars?

A. Yes sir.

Q. All kinds of refrigerator cars?

A. Yes sir.

Q. These are refrigerator cars known as the Santa Fe or S. F.

R. D.?

A. Yes sir.

Q. Those belong to the Santa Fe System?

A. I don't think they do, no sir.

Q. You have no personal knowledge of that?

A. No sir.

Q. The S. F. R. D. means the Santa Fe Railway Dispatch? The initials stand for that?

A. Yes sir.

Q. How long have you been familiar with those cars?

A. Well, all during the length of my service.

Q. Ten years?

A. Yes sir.

Q. You have been ten years in the railway service?

A. Yes sir.

Q. Nine of that has been as a switchman?

A. Yes sir.

281 Q. In speaking of the danger in going from one side ladder to another side ladder you have in mind from box cars, don't you?

A. From one side ladder to another side ladder?

Q. Yes?

A. Yes, there is danger in that?

Q. You had in mind that when you were answering questions on direct examination?

A. He was asking me in regard to an oil tank, wasn't he?

Q. Did you have in mind in giving your answers oil tank cars?

A. That is what he asked me.

Q. You didn't have the National Zinc Company car in mind?

A. No sir.

Q. That is not an oil car, is it? It is a tank car but not an oil car, isn't that right?

A. The tank car- most all use oil.

Q. The National Zinc car is not used for oil, is it?

A. I don't know.

Q. You have been in that kind of service for ten years and unable to tell whether a National Zinc car is an oil car or whether it is some other kind of car?

A. I never paid enough attention to it.

Q. Then you are unable to tell?

A. Yes sir.

Q. You know it is a tank car?

A. Yes sir.

Q. You don't know whether it is an oil car or not?

A. We term it as a tank car.

282 Q. There are tank cars that are oil cars?

A. Yes sir.

Q. The oil cars are ordinary big tanks of oil?

A. The majority of them are, yes sir.

Q. The majority of the oil cars have around them on the upper side of the tank running boards up there to walk along?

A. I won't say the majority. I don't know what per cent, but quite a lot of them have.

Q. I don't include in that the Zinc car. You are not familiar with the make of the Zinc car, are you?

A. No sir.

Q. In your direct examination then, in speaking of the danger you had in mind of the passing of the brakeman from a refrigerator car to an oil car?

A. Yes sir.

Q. Now, what kind of an oil tank did you have in mind? What make?

A. I didn't have any in particular.

Q. There are different makes?

A. Yes sir.

Q. Some of them have run-ways on the floor of the car and some above?

A. Yes sir.

Q. Some have hand holds in various places and some have hand holds in other places?

A. Yes sir.

Q. Then your answers are not very definite in speaking of the dangers when you referred to an oil car since you don't say what kind of an oil car you had in mind? Your answers on that are not very definite, is it?

283 A. No sir.

Q. The danger in passing from one refrigerator car to an oil car is dependent upon the make of the refrigerator car as well as upon the make of the oil car?

A. Yes sir.

Q. In some it is more dangerous and in others it is less?

A. That is a fact, yes sir.

Q. You are not sufficiently familiar with the National Zinc car to speak as to the dangers in passing from a refrigerator car to that car?

Judge FEAZEL: I think that is for the jury to determine, if the Court please.

COURT: Go ahead.

Plaintiff excepted to the ruling of the Court.

A. I will just state there is more dangers in some cars, in going from some refrigerators to some tanks than in others.

Q. But in giving your answers you did not have in mind the National Zinc cars?

A. No sir.

Q. You have no information as to the National Zinc cars so as to give an opinion as to that?

A. No sir.

Q. Mr. Secrest, if a brakeman is going down an end ladder and

falls he will fall in greater danger than if he falls from the side ladder, won't he?

A. I think so, yes sir.

Q. With coal cars, isn't it more dangerous to have the ladders on the end than to have them on the side?

284 A. No sir, I don't think so.

Q. Isn't a coal car one of the most dangerous in the service to pass from one to the other?

A. I won't say it is the most dangerous. There is some danger.

Q. Now, in passing down the end ladder you pass with your face next to the car?

A. Yes.

Q. Then you have to turn in order to get hold of the other car?

A. And climb right over the coal car, that would be the road I would take.

Q. If it should be a box or refrigerator car you wouldn't climb down that ladder at all, but just step from one to the other?

A. Yes sir.

Q. It is when you go from a high to a low car that you pass in the way you described?

A. Yes sir.

Q. There are a great many low cars in the service?

A. Yes sir.

Q. In the service of all railroads, aren't they?

A. Yes sir.

Q. They are more dangerous than the other cars, aren't they, to use in that way?

A. Yes sir.

Q. More dangerous than the oil cars you had in mind?

A. It is loaded, yes sir.

285 Q. But often, when they are unloaded, aren't they more difficult to get on?

A. Yes sir, it is an easy matter to dome down on the box car or refrigerator car to get on an empty one but if it is loaded it is a different proposition.

Q. If it is lumber, or loaded with something difficult to get hold of, that is very dangerous?

A. Yes sir.

Q. And that is more dangerous than an oil car?

A. Yes sir.

Q. Are not the end ladders dangerous where you have a number of lumber cars that must be placed next to one of those refrigerator or box cars? Won't the lumber likely injure you or hurt you?

A. You mean lumber on a flat car?

Q. Yes, or any open car?

A. Not if it is properly loaded.

Q. Even if it is properly loaded, the lumber, in transportation is likely to stick out and hurt you?

A. Sometimes that will occur, yes sir.

Q. You have never worked with the Pennsylvania Railroad, have you?

A. No sir.

Q. Nor any of the Eastern roads?

A. No sir.

Redirect examination.

Questions by Judge FEAZEL:

Q. Mr. Secrest, assuming that the National Zinc car, about which counsel has interrogated you, has its floor as a walk way and no other walk way except the floor of the car, would it not be
286 just as necessary to have end ladders on the box or refrigerator car immediately behind it in making the passage from this box car to the National Zinc car as it would any other car that had its floor for its walk way?

A. Yes sir.

Mr. McDONOUGH: I move to exclude that question and answer. I think counsel ought to be confined to questions that are not leading. The objection is this, that the question is incompetent, irrelevant and immaterial, and is leading; and in addition to this, witness has shown that he knows nothing about the make of the National Zinc car, and therefore, there is no ground upon which the testimony can be based.

Court: Go ahead, let him answer it.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Witness excused.

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Testimony of W. J. Old.

W. J. OLD, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Old, did you know Leslie A. Old in his lifetime?

A. Yes sir.

Q. What relation, if any, did you sustain to him?

A. He was my son.

Q. Do you know how old he was at the time of his death?

A. Twenty-four years old.

Q. Will you please state to the jury what — his physical condition at and prior to his death, as to stoutness and activity?

A. Well, he was a very stout, active man.

Q. Will you please state to the jury how much experience, that is, the length of time he had had as a brakeman prior to his death?

A. Well, if he ever had any until he went to the Kansas City Southern I don't know anything about it.

Mr. McDONOUGH: I move to exclude that as not responsive, not competent, relevant or material.

Court: Overruled.

Defendant excepted to the ruling of the court.

Q. Where had he and you lived prior to the time he went to the Kansas City Southern?

A. We lived—I don't know just exactly how to answer that question, Judge. At Nashville was where we were living.

Q. At Nashville, Arkansas?

88 A. Yes sir.

Q. How long since you left Nashville, Arkansas?

A. Three years ago.

Q. Had you kept up with him pretty well after you left Nashville?

A. Yes sir.

Mr. McDONOUGH: Objected to as leading.

Court: Go ahead.

Defendant excepted to the ruling of the court.

Q. Then, you tell the jury if he ever had any experience, before he went to the Kansas City Southern as a brakeman, you never heard of it?

A. No sir.

Mr. McDONOUGH: Objected to as a conclusion.

Court overruled defendant's objections and defendant excepted.

Q. When did he go with the Kansas City Southern?

A. Some time in October.

Q. What year?

A. 1912.

Q. When did he die?

A. March 24th, 1913.

Q. What kind of position did he have with the Kansas City Southern?

A. Brakeman.

Q. Definite run or extra?

A. No sir, he was an extra man.

Q. Extra brakeman?

9 A. Yes sir.

Q. Were you with him when his contract of employment was made?

A. With him with the Kansas City Southern?

Q. No, were you with your son when he made his contract of employment?

A. No sir.

Q. All you know about that then is what he told you about it?

A. Yes, what he told me.

Mr. McDONOUGH: I move to exclude all that.

Court: What he told you wouldn't be competent testimony.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. You had opportunities to find out what he was doing, didn't you?

A. Yes, he was working for the Kansas City Southern.

Q. Prior to the time he was working for the Kansas City Southern?

A. Oh, he fired on the M. D. & G. some, and he was night-watch or something for an engine on the Iron Mountain a month or such a matter.

Q. How long did he work for the Iron Mountain?

A. About a month.

Q. Were you with him during that time?

A. I was at Nashville. That was his home. He came back there after he quit the road.

Q. Did you see him at work any on the Iron Mountain?

290 A. Yes, I did.

Q. The Iron Mountain running into Nashville?

A. He was watchman for the engine, or hostler, I believe they call it, on the work train and it run in there and done some bridge work and stayed there several times.

Q. How old was he at the time?

A. That has been about four years ago.

Q. He was not of age at that time?

A. No sir.

Q. Had he worked for the M. D. & G. before that?

A. No sir.

Q. When did he work for them?

A. He worked for the M. D. & G. about two years ago.

Q. As fireman?

A. Yes sir.

Q. How long was he in the service of that company?

A. I don't think he worked regular.

Q. Well, how long irregularly?

A. I suppose six months.

Q. Did he ever work for any other company to your knowledge?

A. No sir.

Q. When did you move away from Nashville?

A. February 10th, I think it was.

Q. Had he been working for himself before that time?

A. No sir.

Q. Had he been living at your home up to the time you left Nashville?

A. Yes sir.

291 Q. Had he been living at your home after you left Nashville?

A. I left Nashville myself and stayed in Oklahoma. My family stayed in Nashville up until last Christmas.

Q. Are you still living in Oklahoma now?

- A. Yes, my family is there now though.
- Q. Where was your son living at the time he was injured?
- A. Heavener.
- Q. Had you ever been to Heavener?
- A. Not until he was killed.
- Q. Had you seen him at work on the Kansas City Southern at any time?
- A. Yes sir, I saw him here once.
- Q. Here at Ashdown?
- A. Yes sir.
- Q. When was that?
- A. It was just before Christmas I was down here and he passed through going to Shreveport.
- Q. Now, is it your recollection he was employed on the Kansas City Southern in October?
- A. I think it was in October. I am not right sure about it.
- Q. 1912?
- A. 1912. I think it was in October. It might have been a little later. I wouldn't be positive about that.
- Q. Is that the first work he did for the Kansas City Southern?
- A. The first I know anything about.
- Q. What was his height?
- A. About my height; six feet.
- Q. Wasn't he a little over six feet?
- 92 A. I don't think he was.
- Q. What is your height?
- A. Six feet.
- Q. I will ask you if it isn't a fact he was a little over six feet?
- A. I couldn't answer that.
- Q. He was a tall man.
- A. About my height, yes.
- Q. Well, wasn't he tall?
- A. Yes sir; I am tall.
- Q. A large man, was he?
- A. Yes sir, a larger man than I am.
- Q. What would he weigh?
- A. I will have to tell you what he told me he weighed: about 185 pounds.
- Q. Where was he reared?
- A. Nashville, Arkansas.
- Q. Educated in the schools there?
- A. Yes sir.
- Q. He was a bright, intelligent boy, was he not?
- A. I considered him so, yes sir.
- Q. Had a very good education?
- A. Well, yes; common school education.

Redirect examination.

Questions by Judge FEAZEL:

- Q. How did your son average or compare with other boys, that is the general run of boys, as to intelligence or brightness?

293 Mr. McDONOUGH: That is objected as not competent, material or relevant.

COURT: Go ahead.

Defendant excepted to the ruling of the court, and asked that its exceptions be noted of record, which is *done*.

A. I think it would be a fact he was about as bright as most any I knew of around there.

Q. As a general thing was he about like other boys?

A. Yes sir.

Q. In intelligence and brightness?

A. Yes sir.

Recross-examination.

Questions by Mr. McDONOUGH:

Q. You don't mean to change your other statement you made while ago that you considered him a bright and intelligent young man?

A. Well, I consider that about the same question, both of them.

Witness excused.

294

Testimony of Mrs. Leslie Old.

Mrs. LESLIE OLD, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows, in response to questions propounded by Judge Feazel:

Q. What is your name, please?

A. Anna May Old.

Q. Did you know Leslie Old in his lifetime?

A. Yes, sir.

Q. What relation, if any, did you sustain to him at the time of his death?

A. He was my husband.

Q. When did you marry him?

A. Seventeenth day of January, 1912.

Mr. McDONOUGH: In order to raise the question of the disability of her testimony I desire to object to the introduction of any of her testimony on the ground it is not competent, relevant or material.

COURT: Go ahead.

Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is *done*.

Q. How old was he at the time of his death?

A. Between 24 and 25.

Q. Have you any children born by him?

A. Yes sir.

Q. How many?

A. I have one.

Q. What is its name?

A. William Jenkins Old.

Q. How old was he at the time of his father's death?

295 A. Five weeks old.

Q. Do you remember when Mr. Old went to work as brake-man for the Kansas City Southern?

A. The 10th day of October, 1912.

Q. Will you please state to the jury how much he earned per month during the time he worked with them?

Mr. McDONOUGH: Objected to because she doesn't show she has any knowledge.

COURT: Answer if she knows:

Q. You know, do you?

A. Yes, from sixty-five dollars to seventy dollars, after his books were taken out, his meal books.

Q. What do you mean by books?

A. The books he drew at De Queen and Watts.

Q. You mean the company paid for that?

A. Yes sir.

Q. The custom was to buy meal books for which the company would pay, and then take that out of the monthly settlement?

A. Yes sir.

Q. Now then, you say his monthly salary, during the time he worked there was sixty-five to how much?

A. Seventy-five dollars.

Q. And that was after these meal books had been taken out?

A. Yes sir.

Q. Do you know about what his personal expenses in addition to the meals were, for clothing, shoes and things of that kind?

A. About twenty-five dollars.

296 Mr. McDONOUGH: Objected to, and move to exclude it because there is no showing she has any knowledge of that subject.

COURT: He just ask- her if she knew.

Defendant excepted to the ruling of the court.

Q. I mean his personal expenses; not for yourself or family?

A. About twenty-five dollars.

Q. He spent that personally?

A. Yes sir.

Q. That included the meal ticket?

A. Yes sir.

Q. The whole personal expenses then included about twenty-five dollars? Will you explain to the jury why there was a difference, if you know, between the monthly payments he got from the railroad?

A. He was on the extra board and didn't work some months as much as he did others.

Q. I believe you stated, at the time of his death he was between 24 and 25 years old?

A. Yes sir.

Q. How old were you at that time?

A. Between 23 and 24.

Q. And the baby is how old?

A. Five weeks old.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. Was his 25th birthday his nearest birthday? When was his birthday?

A. On the 29th of June, 1913.

297 Q. He would have been 25 at that time?

A. Yes sir.

Q. What was your nearest birthday at that time?

A. The 30th day of July, 1913, I will be 24.

Q. His earnings, as you have already stated, were sixty-five dollars to seventy-five dollars?

A. Yes sir.

Q. That is the amount he received from the railroad company there?

A. Yes sir.

Q. After deducting the meals?

A. Yes sir.

Q. Now out of that also came his clothing and other personal expenses?

A. Yes sir.

Q. And that you think amounted to twenty-five dollars?

A. With the meals and all, yes sir.

Q. Now Mrs. Old, you have stated that the sixty-five to seventy-five dollars was the amount the railroad paid him after deducting the meals?

A. Yes sir.

Q. Now, the railway company didn't deduct for his clothes and other personal expenses?

A. No sir.

Q. Then from the amount he did receive there was necessarily to be deducted by him his own personal expenses? The railroad company didn't deduct his personal expenses.

A. No sir.

Q. The thing deducted was his meals?

A. Yes sir.

298 Q. After the railroad company had deducted his meals he had left sixty-five to seventy-five dollars per month?

A. Yes sir.

Q. Then, in order to get his earnings, less his personal expenses you would have to take the twenty-five dollars from that sixty-five to seventy-five dollars?

A. No sir, it didn't take the twenty-five, only to put the books in with it.

Q. Then what would you say then was his personal expenses?

A. About ten dollars.

Q. That included his clothes and other personal expenses that were personal to him?

A. Yes sir.

Witness Excused.

299

Testimony of L. S. Monroe.

L. S. MONROE, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Monroe, I believe you said the other day you had been in the service of the Kansas City Southern about two years as brakeman?

A. Yes sir, twenty-nine months.

Q. And that you run from De Queen to Heavener and from Heavener to the next terminal north?

A. Yes sir, Watts.

Q. You also stated that you knew Leslie Old in his lifetime?

A. Yes sir.

Q. Was De Queen at the time of Mr. Old's death and prior thereto, a terminal station?

A. Yes sir.

Q. Will you please state to the jury whether or not the company maintained and kept a car inspector at that point?

Mr. McDONOUGH: That is objected to as not competent or relevant. COURT: Overruled.

Defendant excepted to the ruling of the court, and asked that its exceptions be noted of record, which is done.

Q. Did the company keep an inspector at that point?

Mr. McDONOUGH: My contention at this point is there is not sufficient testimony in the record at this time that would authorize the introduction of any evidence of that kind. In other words, there is not a state of facts shown that would justify or authorize the Kansas City Southern to exclude from transportation 300 cars that were as those cars were which have been described by plaintiff's testimony. Upon the plaintiff's testimony as it now exists there isn't any basis laid for any duty to inspect because there is no showing that the Kansas City Southern could have excluded these cars, even if there had been an inspection.

COURT: Go ahead.

A. Yes sir.

Defendant excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. Had they prior to the time of his death?

A. Yes sir.

Q. What is your brother's name?

A. J. T.

Q. Is he a car inspector?

A. Yes sir.

Q. Tell him to come in, please.

Witness Excused.

301

Testimony of J. T. Monroe.

J. T. MONROE, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Monroe, where do you live?

A. Heavener, Oklahoma.

Q. How long have you been living there?

A. About three years.

Q. What business, if any, are you engaged in at Heavener?

A. Car Inspector.

Q. For what company?

A. Kansas City Southern.

Q. Will you please tell the jury what the duties of the car inspector is?

Mr. McDONOUGH: Same objection as not competent, relevant or material.

COURT: Go ahead. Overruled.

Defendant excepted to the ruling of the court.

A. To look over a train when it leaves at a terminal to see that the cars is O. K., whether it is safe to go forward, and if they are not safe to go forward, they are "bad ordered."

Q. What are the duties of the inspector to a train, that is being prepared to go out to leave a terminal station to inspect the train again after the train is made up again?

A. To look over the train again and see if it is safe to go out?

Q. Suppose he comes to cars that are not sufficiently equipped with safety appliances what is his duty then?

302 A. To "bad order" the car. To "bad order" it and set the repair track and order repairs to be made.

Q. He sets it out and does not permit it to go on?

A. Yes, sir.

Recross-examination.

Questions by Mr. McDONOUGH:

Q. If it is not bad ordered it is his duty to let it go on in the train?

A. Yes sir.

Q. If the car be a Santa Fe refrigerator car that has been in service on and before July 10th, 1911, and has not been rebuilt or practically rebuilt, and it has ladders on the side and no ladders on the end but a hand hold on the end is it not his duty to let it go on?

Judge FEAZEL: I think it is competent to ask what they do with that kind of a car. He may ask what they do under such circum-

stances but as to whether that is the extent of care, that is a question for the jury. He may state whether or not his company. In the form it is asked it is not competent.

Mr. McDONOUGH: The court sustains the objections of the plaintiff.

Q. COURT: If it is not his duty under the instructions of the Company—

Mr. McDONOUGH: The Court sustains the objections.

COURT: In the form it is asked I sustain the objection to it. You may ask him what his duties were under the instruction of his company.

Defendant excepted to the ruling of the Court.

Q. Mr. Monroe, if a Sante Fe refrigerator car did not have end ladders but had side ladders and if it had an end grab iron and if that car was a car that was in service on July 1st, 1911, and
303 was otherwise in good repair, under the instructions of your company, would it or would it not be your duty to let the car pass into the train? Could you cut it out?

A. No sir.

Q. Under those instructions you would be compelled to receive a car of that kind in the train and transport it, ship it out?

A. Yes sir.

Witness excused.

304 Judge FEAZEL: Now, if the court please, I want to introduce the table of life expectancy. I have an agreement with Mr. McDonough that it may be introduced without authentication; that is, he wants to save an exception to materiality and relevancy of it. At age twenty-five the proof in this case, or proof shows that was his nearest birthday—at age twenty-five the expectancy is thirty-eight and eighty-one hundredths years and at twenty-four it is thirty-nine and forty-nine hundredths years.

Plaintiff rests.

Mr. McDONOUGH: I want to, at this point, move for a peremptory instruction, on the ground no cause of action is made out.

COURT: Overruled.

Defendant excepted to the ruling of the Court and asked that its exceptions be noted of record, which is done.

The defendant to sustain its issues, introduced the following evidence:

305 *Testimony of A. C. Holt.*

A. C. HOLT, the first witness called on behalf of the Defendant, after being duly sworn, testified as follows, in response to questions propounded by Mr. McDonough:

Q. Mr. Holt, you were sworn and examined the other day?

A. Yes sir.

Q. I want to ask you, although you may have already testified about it, where the lantern of young Old was found?

A. It was found several feet from him back toward the depot.

Q. Where was it found?

A. Found between the rails. I suppose from him, it must have been, a rough estimate, sixteen or seventeen feet from where he was.

Q. South of where he was?

A. Yes sir, south. Lying between the rails south of where he was.

Q. South of where he was and between the rails?

A. Yes sir.

Q. Do you remember near which rail it was?

A. No sir, I do not, but I remember holding up the lantern and speaking about that.

Q. Did you find the lantern on that night?

A. Yes sir.

Q. Did you find it before anybody else came up there?

A. No sir.

Q. Who was with you at the time the lantern was found?

A. There was several came up about that time?

Q. Did you pick up the lantern or did some one else pick it up in your presence?

306 A. I didn't pick it up, I called their attention to the lantern.

Q. Where was it lying as between the rails? Was it in the center or nearer one way or the other?

A. I don't remember. It was something near the center of the track, though. I couldn't state.

Q. Was it lighted or was it out?

A. It was out.

Q. Was the globe in it or not?

A. The globe was broken. It wasn't in it.

Q. Did you find any glass that came out of the globe?

A. Yes sir, the globe was there.

Q. Where was the glass?

A. It was right near the lantern.

Q. Between the rails or outside the rails?

A. Between the rails.

Q. You spoke of the blood on one of the rails, I wish to ask you which rail, whether the rail next to the depot or the outside rail?

A. It was the rail next to the depot.

Q. That is the east rail?

A. Yes, sir.

Q. The depot at Page is on the east side?

A. Yes, sir.

Q. Mr. Holt, there is a large store, or other building, I don't know what it is, just north of the station of Page, and on the opposite side of the track, what kind of a building is that?

A. That is the store that I run.

307 Q. Was the body of Mr. Old as far up as that?

A. It was right behind the center of the store.

Q. By behind, you mean east of it?

A. Yes sir, the store faces west. The back of the store is to the railroad.

Q. Mr. Holt, state whether or not any whiskey was found in the pockets of Mr. Old?

A. Yes, sir.

Q. How much, and what was in it?

A. It was a small bottle.

Q. About what size bottle?

A. Well, I judge it to be something like a half a pint.

Q. Was it full or not?

A. No sir, it wasn't full.

Q. About how much whiskey was in the bottle?

A. I pronounced the bottle about—

Judge FEAZEL: I don't know that that is material. If they show this man was intoxicated then it would be material perhaps but this neither tends directly or indirectly to show he was intoxicated.

COURT: I think it is competent to go for what it is worth. It, within itself, may not be competent, but I think it is competent taken in with other testimony they may have to offer if they have any.

Plaintiff excepted to the ruling of the Court.

Q. Mr. Holt, Judge Feazel used the word "vial." Was it a little vial big as your finger or was it larger than that?

A. I am not in the habit of handling anything like that, but I judge it to be something like a half pint. It was a long bottle.

308 Q. The bottle was about two-thirds full?

A. Yes sir.

Q. Mr. Holt, state whether or not you smelled whiskey upon the breath of Mr. Old?

A. To the best of my knowledge I did.

Q. Was that while he was between the tracks, or was it after you had taken him to the depot?

A. Well, I didn't notice it until after I had taken him to the depot. I smelled whiskey though, but I didn't know where it was.

Q. You smelled whiskey when you first found him?

A. I didn't smell whiskey until the other boys came up.

Q. What other boys were they?

A. The boys that helped carry him to the depot.

Q. And who were they.

A. George Tucker and Square Maggard and Edgar Blakely, and someone else, I don't know who it was.

Q. State whether or not you asked Mr. Old how this occurred?

A. Yes sir, I asked him.

Q. State what he said, what you said to him on that subject and what he said in reply?

A. Well, it was sometime after I carried him to the depot before I asked him anything about it, and I asked him—he was weak—I asked him, he made no reply, and I shook him sorter and told him I would be glad to know how come him to get hurt, and I think I asked him the third time and I bent over him and I understood him to say he went to catch the train and slipped. He was very weak

for it was sometime after he had been in the depot, an hour I suppose. He never said anything after that that I remember.

Judge FEAZEL: That was the last words he spoke?

A. With any sense to it.

Q. He was conscious at that time?

A. I don't know at that time; that is a very hard question for me to answer. I could tell if you want me to all I said to him?

Q. Al- right?

A. I asked him then afterwards did he go to catch the train or caboose, and he said train. I asked him who his conductor was on this train.

Q. What did he say?

A. He says Harry Eames.

Q. Did you ask him anything else?

A. No sir, I did not; not then. I spoke to him afterwards but I got no reply to that.

Q. Did you at that time or a short time previous ask him his name?

A. I asked him his name when I went to him.

Q. What reply did he make to that?

A. When I went to him he told me his name was Leslie Old, and I asked him where his people lived and he told me at Idabel, Oklahoma, and I asked him of any connection of his near here and he said he had a brother at Heavener, if he wasn't out. That was when I first went to him.

Q. State whether or not you were with him all the time from the time you found him up until he died?

310 A. I stepped in the store to get a sheet. I was away from him three minutes. Then I stepped into the depot to turn in a statement to the agent just next door in regard to how he was hurt is the only time I left him. I was right with him all the time; never left him.

Q. Did you or did you not hear him make any statement one way or another as to his throwing a rock into the window?

A. I did not.

Q. Did you examine the window to see whether or not a rock had been thrown into it?

Judge FEAZEL: What connection has that with the case, please?

COURT: I don't see *what* within itself is competent. I will let him answer. If it doesn't become material I will exclude it.

Plaintiff excepted to the ruling of the Court.

A. There was a hole knocked in the window.

Q. Did you see any rock there?

A. I saw a rock inside.

Q. I wish you would describe that hole and describe the appearances? I am not permitted to ask you leading questions so I wish you would describe it exactly as you found it, the hole, direction of it and all about it?

A. Well, from the rock, apparently from the place knocked on the table where the keys are downward from the window, it seems like the rock was going with force.

COURT: Just describe how it looked.

A. Downward.

COURT: Tell what kind of a place was on the table.

Q. Describe the place that you saw on the table?

A. Well, there was a dent knocked in on the table where the rock struck.

311 Q. How near was that dent to where the operator would be sitting if he had been at the keys?

A. Why the dent was a little south of where the operator was sitting.

Q. How far?

A. The rock may have struck him if it had bounced straight. The rock wouldn't have struck the operator if it had struck the table in front of him. The rock probably came a little backward downward and passed sorter.

Q. What kind of a place in the building is the window? Just describe it as though we knew nothing about it? What window it was in and what part of the house that was?

A. The window was right next to the track and the panes was small and long and the top of the pane and the bottom wasn't there, why I could tell where the rock went through, suppose went through.

Q. State whether or not it was the window that comes out from the surface of the building?

A. Yes sir, the partition is built out on a small window at the end so the operator can see the trains coming in, and the window is built out in front of it.

Q. Was it in the window right in front of where the operator sits or was it in the window in the side?

A. Right in front of the window where he sits and the rock apparently came a little north—

Q. That train was going north on that night?

A. Yes, sir.

312 Q. Where was the glass, if you saw any glass, that was broken out of that window?

A. Some of the glass was on the table where the rock struck. I saw them take it up.

Q. Mr. Holt, state whether or not Mr. Old vomited at any time after you found him?

A. One time after I got him in the depot.

Q. State whether or not there was any smell of whiskey on that which he vomited up or not?

A. I didn't smell that, but I smelled whiskey about the time he vomited. Of course I didn't smell of the vomit.

Cross-examination.

Questions by Judge FEAZEL:

Q. Mr. Holt, what became of the bottle of whiskey that was found in Mr. Old's pocket?

A. I don't know, sir. When they carried him off the whiskey was lying between his legs I think. Some one had laid it there.

Q. How did they carry him off? on a cot?

A. No sir, I think they laid him on a cushion that was in the depot there.

Q. They carried him off on the train?

A. Yes, sir.

Q. And laid the bottle of whiskey on the same cushion that he was lying on there?

A. The last time I saw it it was.

Q. Do you think you would recognize the bottle of whiskey if you should see it?

A. I don't know sir. It was a slim bottle.

313 Q. How does the appearance of that compare with it?

A. That is something like it.

Q. And there was about the same quantity of whiskey in it as that?

A. Yes sir, something similar to that as far as I know.

Q. Now Mr. Holt, you say when you first went out there where he was you didn't smell any whiskey until the balance of the crowd came?

A. No sir, until about the time we picked him up.

Q. You said to Brother Mack who those parties were. One of them was Mr. Tucker? Is that correct?

A. Yes, sir.

Q. Mr. Tucker represented what position with the railroad at that time?

A. None at all. He was our feeder. He was a brother to the agent.

Q. Did the agent come out there at that time?

A. Yes sir, he came out but went back when he got his name.

Q. Was he present when he got the whiskey?

A. I don't think he was close.

Q. Do you know where the scent of that whiskey came from?

A. No sir.

Q. You don't know whether it was from Old?

A. No sir.

Q. You are not prepared to tell the jury Mr. Old was drinking whiskey at that time, are you, or that he was under the influence of whiskey or intoxicated at that time?

314 A. No sir, I am not prepared to tell it. I never said he was intoxicated, but as I stated, the best of my knowledge I smelled whiskey on his breath after I got him in the depot.

Q. There had been quite a good deal of drinking in that same station house that afternoon before that train got there, had there not?

A. I don't know. I hadn't been in the depot.

Q. Did you see the agent that night?

A. Yes sir.

Q. Isn't it true he was intoxicated?

A. Yes sir, to the best of my judgment he was.

Q. Didn't you smell whiskey on him very strongly?

A. I did.

Q. Didn't you smell it where he had been in his office?

A. I wasn't in his office but once and I was right up against him then giving him a statement in regard to the way the fellow was hurt.

Q. You didn't ask Mr. Old, I understood you to say, for more than an hour after he was carried in there, how he was hurt?

A. Yes sir.

Q. I understood you to say you asked him perhaps the third time before you got any reply?

A. I did.

Q. He was sinking before you asked him that wasn't he?

A. Yes sir, he was low.

15 Q. You are not prepared to say whether he was conscious or unconscious when he answered your questions, are you?

A. No sir, you all know as much about that as I do. I am no physician. I couldn't state.

Q. He had talked to you before when you first got to him,ationally?

A. Yes sir.

Q. Told you where his people lived?

A. Yes sir.

Q. Now what position was his head in when he finally answered you and told you how he got hurt? Did you have his head in your lap or in your arms?

A. No sir, I don't think so. I had my hand—I sorter shook his head. I was right down before him.

Q. He answered low?

A. Yes, sir.

Q. Your head was right close to his mouth?

A. Yes, sir.

Q. Did he answer close enough for anyone else to hear him?

A. Edgar Blakely was down about like I was.

Q. Didn't you ask him if he got hurt trying to get on the caboose?

A. I asked him if it was the caboose or train he tried to catch?

Q. Just frame the question you propounded to him just as nearly the exact language you used as you can remember just like it occurred, what you said to him and what he said to you?

16 A. I asked him how come him to get hurt, but then I think I changed and asked him how did he get hurt, something of that sort. I asked him the second or third time. I am most sure it was the third time, and I understood him to say he went to catch the train and slipped.

Q. He didn't say what part of the train?

A. No sir.

Q. Then you suggested what part, the caboose or train?

A. Caboose or train, and he says train.

Q. That is all he said in reference to it?

A. That is all he said, but I asked him who his conductor was on this train and he said——

Q. Harry Eames?

A. Yes, sir.

Q. Had you found out before this that Harry Eames was his conductor?

A. I had not, and Blakely asked me who did he say the conductor was. I remember Blakely was with me.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. Mr. Holt, as I understand you, this statement which you have just testified to occurred about an hour after you found him?

A. Something near that. Something near an hour.

Q. As I understand your statement the other day he appeared to be conscious for something like an hour and a half after
317 you found him?

A. No sir, I didn't say that.

Q. What was it you said about how long he remained conscious?

A. About a half hour before he died.

Q. And you found him at what time?

A. I suppose—Now, we have different times there, the planer has the time and the railroad has the time. According to my time I found him about twenty-five minutes to nine I suppose.

Q. What is the difference between your time and the railroad time?

A. I don't know the difference between the times. I went by my watch. It was something near that time.

Q. After making that statement you asked him the conductor and and he gave you the name of Harry Eames?

A. Yes sir.

Q. Did you know Harry Eames?

A. I did, yes sir.

Q. Had anybody suggested to you before that, the name of Harry Eames as the conductor?

A. No sir, I didn't know in what railroad crew.

Q. His statement to you as to who the conductor was is the first information you had as to who was the conductor on that train?

A. Yes sir.

Q. Before those men came up, did you make any investigation as to whether there was the smell of whiskey on his breath?
318

A. I did not. Those people were right at me when I got there. Tucker was right behind me and followed me with the lantern and the other boys came up right in front of me.

Q. After you got him in the depot, you did, in your judgment, smell whiskey on his breath? Was any question asked him about the whiskey?

A. No sir, I never heard any if there was.

Q. What was the name of the agent?

A. Bent Tucker.

Q. Do you know what his initials are?

A. No sir, I don't know.

Q. What was the name of the one in your employment?

A. George Tucker.

Q. Bent Tucker, you say the other one is?

A. That is what they call him around there. I don't know whether it is or not.

Witness excused.

319 Judge FEAZEL: Will the court let me introduce one witness here a little out of order so he can go off on this train?
COURT: Yes sir.

GLEN OLD, called by the plaintiff, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

- Q. Your name is Glen Old?
A. Yes, sir.
Q. What relation, if any, were you to Leslie Old in his lifetime?
A. Brother.
Q. You remember the time he was killed, do you?
A. Yes, sir.
Q. His body was carried to Heavener, was it?
A. Yes, sir.
Q. It was turned over to whom for preparation for burial?
A. The undertaker there.
Q. Did you see his body after it got there?
A. Yes, sir.
Q. Did you go where they were preparing it for burial?
A. I did the next day.
Q. Was there a bottle of whiskey turned over to you as being the bottle of whiskey found on his person at his death?
A. Yes, sir.
Q. Is that the bottle of whiskey? (Indicating.)
A. Yes, sir.
20 Q. What did you do with it?
A. I took it off of him.
Q. Who did you turn it over to?
A. I turned it over to his wife.
Q. You think that is the same bottle that was taken from the place by you where his body was being prepared for burial?
A. It is just like it.
Q. Was there any label on it when it was turned over to you?
A. No sir.

Witness excused.

21 *Testimony of H. Tucker.*

H. TUCKER, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

- Q. Where do you live, Mr. Tucker?
A. Why, I live at Page at present.
Q. At Page, Oklahoma?
A. Yes, sir.

Q. Are you in the employ of the Kansas City Southern Railway Company?

A. Not at present, only as a witness.

Q. Were you in the employ of the Kansas City Southern in March of this year?

A. Yes, sir.

Q. In what capacity?

A. I was agent and operator at Page.

Q. Were you acquainted with Mr. Leslie Old?

A. No sir, not personally. Well, you might say I am not.

Q. Were you agent and operator on the night that Leslie Old was injured and killed at Page?

A. Yes, sir.

Q. What time did that train arrive there?

A. I think the record shows 8:25 or 8:20.

Judge FEAZEL: Let him introduce the record.

COURT: He can testify from his knowledge if he knows. He can't tell the contents of the record.

A. I will say 8:20 best of my knowledge.

Mr. McDONOUGH: He has a right to refresh his memory from the record.

COURT: If he has it.

322 Q. How long did the train stay there?

A. Well, about ten minutes I suppose; ten or twelve minutes. Something like that.

Q. Who was the conductor?

A. Harry Eames.

Q. Who were the brakemen besides Mr. Old. Who were the other brakemen?

A. I couldn't say. There is a fellow here I learned his name afterwards, Mr. Smith. I didn't know at the time his name.

Q. You were not acquainted with him personally?

A. No sir.

Q. State if you saw Mr. Old, the man who was hurt, when the train first came in?

A. The first man in the office after the train came in was Mr. Old.

Q. State whether or not there was any quarrel or difficulty between you and him?

Judge FEAZEL: Object to it.

COURT: It couldn't be admissible except for one purpose. It couldn't be considered except for one purpose. You stated in your opening statement here that deceased was drunk and raised a disturbance. The only purpose for which it could be introduced would be the circumstances in determining whether or not he was drunk.

Judge FEAZEL: If you limit it to the consideration of the jury for that purpose then I will withdraw my objection.

COURT: This will be admitted in so far as it may tend to show

323 that deceased was drunk. That is the only purpose for which the testimony may be considered by the jury.

Mr. McDONOUGH: I desire to save an exception to the Court's ruling upon that, upon the ground that this testimony, if it is true, would equally tend to show he was negligent taken in connection with the other effort which I will afterwards introduce to show that he threw the rock, and it is for the jury to say whether or not, he, in throwing the rock, made a mis-step and fell, and in that connection it is also permissible, and I save an exception to the Court's excluding it for that purpose.

Court: I don't know that that might be proper for the jury to take that into consideration.

Judge FEAZEL: That may be taken when he makes that other proof. Let him make the connection first, then if he wants to, he may recall—

Court: Go ahead.

A. Yes sir, there was some quarrel.

Q. Now, as to his condition whether he was drinking or not I wish you would state, in your opinion whether he was drunk or whether he was drinking?

A. Well, in my opinion—

Judge FEAZEL: Has he got a right to express his opinion on that?

Court: I think he can as to the man's condition as to being drunk or sober I think he can.

Plaintiff excepted to the ruling of the court.

A. Well. I formed my opinion—

Court: Just tell whether you think he was drunk or sober or not.

A. In my opinion I think he was drinking.

324 Q. State whether or not he made any threat against you during that quarrel or during that trouble?

A. Yes he made the threat he would come in and get me.

Q. Said he would come in and get you?

A. Yes, sir.

Q. After that was there a rock thrown through the window?

A. Yes sir, in just a few moments.

Q. Did you throw that rock through?

A. No sir.

Q. Did you see the man who did throw it through?

A. No sir.

Q. That rock was thrown through just a few moments after Mr. [unclear] said he would come in and get you?

A. Yes, sir.

Q. Describe how the rock came in? I am not permitted to ask you leading questions so describe it in your own way?

A. Well, from my opinion—

Q. I didn't ask for your opinion. Just describe the appearances, where it hit, what glass it knocked out, what direction it came from and all that?

A. Well, the rock hit the pane on one of the sash. It went across about the middle of the sash, it hit on two of the panes, the sash it went across the middle sash, it went across, the rock hit that, and most of the rock went down towards the telegraph desk. The bottom of the pane was about three or four inches lower than the level of the telegraph desk and the rock came in and hit the pane across, the middle pane, and the rock all went below, that is, 325 the sign was below where the rock had hit on the desk. A piece hit in the desk and made a dent something like a quarter of an inch or half an inch deep, another piece hit over again my desk and it was all over the floor and from the way the rock came in it came in on a slant I should think.

Q. From the way it came in state whether or not it figured to come from exactly west of the station, assuming that the track there runs north and south or whether it was to the north or south of the point where it struck the window?

A. Well, it is, I think—the depot sets due west and there is nothing to tell why it shouldn't come in right straight from the track right about even with the window. The train must have been even with the window when the rock came through.

Q. Where were you when the rock came in?

A. I was at the back door of the office. I was out at the back door of the office almost to the door of the negro waiting room.

Q. If you had been sitting at your desk at your key how far would the rock have come from you?

A. Well, if the rock had went above the point it would have hit me along about the neck or shoulders.

Q. If you had been sitting at your keys?

A. Yes, sir.

Q. Is that the customary place you had been sitting?

326 A. Yes, sir.

Q. Was it the place you were sitting when Leslie Old went out of there?

A. No, sir, I was standing up in the office.

Q. That was the seat where you sat as operator?

A. Yes, sir.

Q. Mr. Tucker, did you observe of what became of Old immediately after he met the train and left, whether or not he went on the train or not?

A. No sir, I looked out at the window. I came up to the desk and looked out at the window, leaned my hands over on the desk and looked out at one of the bay windows, side windows. I saw two lights on the upper end of the platform.

Q. What do you mean by upper end of the platform?

A. South end.

Q. What became of those lights, if you knew?

A. I never did see them catch the train. I never did see them disappear.

Q. What kind of a rock was that as to size that came through?

A. Well, the rock, I would judge to be as big as my two fists altogether. It was all busted to pieces after it was picked up.

Q. What kind of a rock was it?

A. It was a chert rock, soft when you dig it, and after it gets in the sun it gets hard, makes a rock.

Q. Were there any rocks of that nature in the neighborhood of where you saw these two lights?

A. Yes, sir.

327 Q. State whether or not that kind of a rock had been used as ballast all along there on the railroad?

A. It was this same kind of rock.

Q. Mr. Tucker, state whether or not the train was moving at the time the rock came through the window?

A. Yes, sir.

Q. How long after that was it before you learned of Mr. Old being hurt?

A. Well, it was just I would—the train—the caboose hadn't got over a hundred—between a hundred and a hundred and fifty yards away from the depot until I reported the train.

Q. What do you mean by reporting the train?

A. That is the time in and the time out. O'sing is what we call O'sing.

Q. You do that on the telegraph instrument?

A. Yes, sir.

Q. That notifies the general dispatcher of the time the train arrived and the time it left?

A. Yes, sir.

Q. Go ahead with your statement.

A. And I gave him "good night" as soon as I did this.

Q. What do you mean by that?

A. Ask him "good night" just say G. N., and he would say O. K. That is what he did that night.

Q. That means you are through with your duties there?

A. Yes, sir.

Q. Al-right, go on

A. And as I was getting ready to go home Mr. A. C. Holt came to my office and asked for a lantern.

328 Q. Did he tell you a man had been hurt at that time?

A. No sir.

Q. How long after that?

A. It was just as soon as we could get a lantern and walk down here. I got my lantern out of the window. I had to come around the office and he was just a few feet ahead of me.

Q. Did you help bring him back to the station?

A. No sir.

Q. Was he brought back in your presence?

A. No sir.

Q. Were you near about him any after he was found up there?

A. I went down there. I was right there when they found him and Mr. Holt and the boys that was there—

Q. State whether or not you discovered or noticed any smell of whiskey about Mr. Old, about his body, the breath or anything of that kind after he was hurt?

A. All I seen was just a bottle, small bottle, something like a half pint setting by him when he was in the freight room. I never smelled any whiskey on him.

Q. State whether or not you heard him make any statement as to how he got hurt?

A. I did not.

Cross-examination.

Questions by Judge FEAZEL:

Q. You are not in the employ of the Kansas City Southern now, are you?

329 A. No sir, nothing only as a witness.

Q. Have they got you employed as a witness?

A. I don't know whether that is employed or not.

Q. Where were you when you came here as a witness?

A. I was operator in Antlers, Oklahoma.

Q. Do you still hold that position?

A. No sir. I resigned that position.

Q. That is on the Frisco, I believe it is?

A. Yes, sir. I have resigned it since I came here.

Q. Why did you resign?

Mr. McDONOUGH: That is objected to.

Court: Go ahead.

Defendant excepted to the ruling of the Court.

Q. Why did you resign?

A. I resigned from Antlers.

Q. Why did you do it?

A. Because I didn't want to work for the road.

Q. Hasn't the K. C. S. promised to give you a job somewhere?

A. They hadn't.

Q. Where are you going to get a job? at what point?

A. I have no surety of any job.

Q. You have it in view to get a job from the K. C. S.?

A. I had it in view I would get a job if I could. I had it in view to go to Texarkana, and if I couldn't get one there to go somewhere else.

Q. Have any of them led you to believe you would get a job?

A. No sir.

330 Q. I believe you stated, immediately after the rock was thrown through the window, you went to the window and looked out? Went to the desk and looked through the bay window I believe you called it? Is that correct?

A. I said when the rock was thrown through the window I was out nearly to the negro waiting room door, and my brother hollered to me to look here—

Q. You immediately went in there?

- A. Yes, sir.
 Q. Did you look out?
 A. Yes, sir.
 Q. What did you see?
 A. I seen the train going and some lights.
 Q. Where did you see any lights?
 A. I supposed one to be hanging out—
 Q. Where did you see any lights, if you saw any?
 A. I seen the signal lights, one on each side of the caboose, then the top light, red light, and then in the cupola.
 Q. What lights you say was in the caboose?
 A. No sir, I seen one ahead—I think it was ahead of the caboose.
 Q. You saw one light then in front of the caboose and the other two down about the caboose? Is that the way I understand you?
 A. I saw the signal lights behind, tail lights, signal lights.
 Q. And the other in the cupola, did you say?
 A. One light, red, in the cupola; also one on the side of the caboose.
 331 Q. You saw one on top of the car?
 A. It looked to be on top.
 Q. How many car lengths from the caboose?
 A. I judge it to be three or four cars; probably further.
 Q. You didn't see anybody throw that rock?
 A. No sir.
 Q. You don't know where it came from?
 A. No sir.
 Q. How far from the ground now did it strike the window?
 A. About five feet.
 Q. And you say it came right through the window from the railroad track and struck your desk right in front of the window near where the keys are? Is that correct?
 A. The way it hit it was in a sloping way. It was in front of the window, square in front of the window; that is, the way I judge it hit it came in a sloping way.
 Q. I understand that, but say that track was due west of the depot, it came from a due western course?
 A. Yes, sir.
 Q. The train was moving when you got in there and looked out of the window?
 A. Yes, sir.
 Q. You know Mr. Holt, do you, the witness who has just left the stand?
 A. Yes, sir.
 Q. Didn't you, on that same night, when the rock was thrown, when he went in there after a light or about that time,
 332 tell him that the rock that went in the window there came from the caboose?
 A. No sir.
 Q. Anything similar to that?
 A. I told him we judged how far it was when it was all over with, how far it was from the caboose.

Q. Didn't you tell Mr. Holt, that that rock that came through that window came from the caboose?

A. No sir.

Q. You were drinking that night yourself, were you not?

A. Not that night, no sir.

Q. When had you been drinking?

A. I had taken a drink that day at noon.

Q. How many?

A. One.

Q. Only one?

A. Yes.

Q. Were you not intoxicated when that train was there?

A. No sir.

Q. Had you not been just before the train got there?

A. No sir.

Q. You were not intoxicated that afternoon at all?

A. No sir, no more than taking a drink.

Q. Just one drink, that doesn't intoxicate a man, does it?

A. It don't me.

Q. You have seen other men taking one drink, have you ever seen one drink intoxicate anybody?

A. Well, I don't know as I have.

Q. Now, then, I believe you, in answer to a question by 333 Mr. McDonough, stated, after this racket you saw two lights down on the south end of the platform. What racket did you refer to; the throwing of the rock or quarrel you and Old had in there?

A. The racket we had in the depot there.

Q. You saw two lights standing down on the south end of the depot?

A. Yes, sir.

Q. That platform there is just a gravel platform there, isn't it?

A. Yes, sir.

Q. It is all on the ground?

A. Yes, sir.

Q. Then that was the racket you had reference to, when you told him you saw two lights down there after the racket?

A. Yes, sir.

Q. How long after that racket was it you say the rock came through

A. A minute or two minutes.

Q. Did you see what became of those two lights on the south end of the platform?

A. No sir.

Q. How long did you watch them?

A. I just looked out of the window and saw them.

Q. Where were you then?

A. I was up at the telegraph table.

Q. And looked out through the window about where the rock struck?

334 A. No sir, I was up above the next window from the window that the rock struck.

Q. You have your keys on the window the rock struck?

A. Yes, sir.

Q. You were near those keys when you looked out and saw those two lights

A. I was south of the keys.

Q. About how far?

A. The keys is in different places from the instruments. The instruments and keys altogether are scattered all up and down the table.

Q. I mean the keys where you operate the instrument?

A. I was two or three feet from the keys.

Q. Your office was lighted up that night, was it not?

A. Yes, sir.

Q. What kind of light?

A. Kerosene—just a common kerosene lamp.

Q. How many lamps did you have in there?

A. One.

Q. Where was that setting?

A. When I taken the order for the conductor to sign I set the lamp upon the ticket window.

Q. How far from this key board you are talking about?

A. Something like from here to that desk, probably not as far.

Q. The key board was between the light and the window was it not?

A. Well, the key board is at the far side of the depot.

335 Q. I am asking about the window where that rock came through and where you had that light. Wasn't that key-board between those two points?

A. My keys was, sure.

Q. Was there anything to prevent the man that threw that rock to see through the window and see that you were not sitting at those keys that you knew of?

A. The curtain was up, and my brother was standing just about where I was sitting.

Q. You still don't answer my question. I asked you if there was any obstruction or anything to prevent the man who threw that rock to see through that window and ascertain that you were not sitting at that key board

A. Well, there is nothing to prevent from seeing any but I don't know about identifying a person being at the table.

Q. I believe you said you had only taken one drink that day?

A. Yes, sir.

Q. That was what time of the day?

A. About—between 12 and 2 o'clock.

Q. You had whiskey in the station house, didn't you?

A. No sir, I had it at home.

Q. Are you a married man?

A. Yes, sir.

Q. You didn't have any in the station house?

A. No sir.

Q. That evening or that night?

A. No sir.

Q. How long after that did you remain in the service of the Kansas City Southern.

336 A. I remained there until May 26th.

Q. Did you resign or they discharge you?

A. They discharged me.

Q. They discharged you for intoxication, did they not?

A. That is what they discharged me for, yes sir.

Q. Of course those are unpleasant things, Mr. Tucker. I hate to ask you them.

A. I would like to say I never did get any hearing from my case. We have a right to take up our case for grievances and I never did hear any.

Q. Now then, you went from there over to Antlers, Oklahoma, immediately, did you, and secured a job there?

A. Yes, sir.

Q. You remained over there until you were notified as a witness?

A. Yes, sir.

Q. Now, you have no job and hope to get one from the Kansas City Southern?

A. It don't make any difference to me whether I get one from them or not.

Q. How long have you been an operator?

A. Since March, 1909.

Q. Did you have any other force in the office at that time?

A. When I was agent?

Q. Yes?

A. Yes, sir, I had a night operator.

Q. Well, the agent and the operator performed both services?

A. Yes, sir.

337 Q. You worked in the daytime only?

A. Yes, sir.

Q. And you had a man to look after the business during the night?

A. Yes, sir.

Q. How came you on duty during the night if you were day operator?

A. The night — went on duty at ten o'clock.

Q. You mean he comes on duty at ten o'clock?

A. Yes, sir.

Q. You go off at ten o'clock?

A. No sir, I go off at eight o'clock. The office is closed between eight and ten, and they give me over time what time I work over time.

Q. What kind of a window did you have there at the station? What is called a bay window?

A. Yes, sir.

Q. That is a window that extends out from the wall of the building?

A. Yes sir, what I call a bay window. It extends out.

Q. You can stick your head up in that window and see down the track?

A. Yes sir, you can see it each way.

Q. You say you saw how many lights on that caboose when you looked out there for lights?

A. Outside of the regular train signals——

Q. Where is that now, the signal?

A. That is the tail light.

Q. Where does that set? On the rear platform of the caboose?

338 A. They are up near the top of each side of the caboose.

Q. Hanging on each side of the caboose?

A. Yes sir, and then there is a red light in the cupola.

Q. Where was the caboose when you saw those three lights?

A. They was——

Q. Had they passed the depot?

A. Yes sir, they had passed—they was at the lower end of the platform, or passed the lower end, I couldn't say which.

Q. You mean the south end?

A. The north end. They were there or passed it.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. Mr. Tucker, you were not discharged for any drunkenness on that night?

A. No sir.

Q. You never had a quarrel there with anybody else; that is, had a difficulty with anybody that night except Leslie Old?

A. No sir.

Q. That was the only one?

A. That is the only one.

Recross-examination.

Questions by Judge FEAZEL:

Q. Did I understand you to say Leslie Old came in the depot first that night when that train stopped there?

A. He was the first one that I noticed.

Q. Don't you know this young Smith, Vandervort Smith, came in first, that as the train pulled in he jumped down off the engine and went into the station, and later Old came in and then Eames came in?

339 A. Might have done it, but Mr. Old was the first man to my knowledge being in there.

Q. Who was present when you say you and Mr. Old was fussing in there?

A. My brother was present.

Q. I mean of that train crew?

A. Mr. Eames was in there until he got his orders. I can't say

how much of it he heard. He probably yaken it for jushing while he was in there which it commenced to be I suppose.

Q. You were not made, were you?

A. No sir.

Q. The remark he made, is that the only remark he made to indicate he was mad?

A. No sir.

Q. What else did he say?

A. He called me a son-of-a-bitch and cursed me.

Q. Who was present when that was done?

A. My brother.

Q. Was any of the train crew present when that occurred?

A. No sir, I don't think they were in the room. If they heard it they were out on the platform.

Q. How long had Mr. Eames been out of the room when that occurred?

A. Just a few moments.

Q. You mean five or six minutes?

340 A. Something like that. The train wasn't there. It was all done in ten or twelve minutes, something like that.

Q. How long had Smith been out of the room?

A. He was the first man out of the room. He consumed about three or four minutes getting the orders and then he started ahead with the engineer's orders and then after he started Eames went and Old he stood there.

Q. Just a moment or two?

A. He stood there until after the train commenced to move.

Recross-examination.

Questions by Judge FEAZEL:

Q. What is your brother's name?

A. G. A. Tucker.

Witness excused.

341

Testimony of G. A. Tucker.

G. A. TUCKER, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows, in response to questions propounded by Mr. McDonough:

Q. Mr. Tucker, where do you live?

A. I live at Page.

Q. What is your business?

A. I work for the Buchaw-Blackwell Lumber Company.

Q. How long have you been in the employ of that company?

A. I came there last September, along about the first of the month.

Q. Were you working there at Page in the employment of that company, March this year?

A. Yes, sir.

- Q. What kind of work were you engaged in?
 A. I was engaged in the planer work.
 Q. Do you know Mr. H. Tucker?
 A. Yes, sir.
 Q. Is he your brother?
 A. Yes, sir.
 Q. Were you at the station on the night Leslie Old was found there on the track, injured?
 A. Yes, sir.
 Q. What were you doing there that night?
 A. I was over at the depot, had been to the post office, and Mr. Tucker, myself, and some more fellows were at the post office and all started to the depot and we got over there at the platform, he says to me, he says, "come and stay a while——"
 342 Q. Don't tell what was said. Was the train there when you got to the depot?
 A. No sir.
 Q. Did it come in after you got there?
 A. Yes, sir.
 Q. Where were you when the train arrived?
 A. I was sitting on the table at the desk.
 Q. Were you there when Leslie Old came up?
 A. Yes, sir.
 Q. Did you have a boy in there?
 A. Yes, sir.
 Q. What size was that boy?
 A. Ten years old.
 Q. Was he there with you in the room?
 A. Yes, sir.
 Q. Did you hear any difficulty or quarrel between your brother and Leslie Old?
 A. Yes, they had a little difficulty.
 Q. Did you hear Leslie Old say anything as to what he would do if anything at the end of that quarrel?
 A. Did you want me to tell the conversation?
 Q. Well, I am perfectly willing. There is some of that language I didn't want to ask for but go ahead and tell it.
 A. He came to the window——
 Q. Did Old come on the inside or outside?
 A. He was on the inside of the waiting room. There is a partition between the waiting room and the freight room. He came to that window and my brother told me to open that window
 343 and I opened it. He came up and says, "what have you got for us"? He says, "Mr. Tucker, I ain't got it yet, I am just finishing up on it." He kept on talking and my brother told him, says, "I can't talk to you and this man too. He told him—Well, he made the remark to talk to him.

COURT: Don't tell and conversation.

Mr. McDONOUGH: I think that is admissible.

COURT: Don't go into any details.

Mr. McDONOUGH: It was with Leslie Old.

COURT: If Leslie Old made any threats there it is competent.

Q. Well, state what he said if anything in the way of threats?

A. Why, he said if he didn't talk to him he would come through the window after him. I just supposed—

Q. Don't tell what you supposed. Just tell what he said. State whether or not Leslie Old said anything about having a gun or pistol or anything of the kind?

A. Yes, he did.

Q. What did he say?

A. He said he was a marshall, he had a gun.

Q. Did he say what he would do with it, if anything?

A. No, I don't remember him saying what he would do with it.

Q. Did he say anything else with reference there to your brother?

A. Nothing only still in the conversation.

Q. What became with Leslie Old after the end of that conversation?

344 A. Well, he went out with Mr. Eames; Conductor Eames.

Q. What was the next thing that happened there about the building?

A. The next thing that happened after they went out the train started up.

Q. What was the next thing happened?

A. The next thing that happened there was a rock come through the window.

Q. Describe how that came through?

A. I had gotten up off the table and was standing looking through the window facing the track, and my little boy was standing right by the desk with me, and my brother had went in the negro room to get him a drink of water, and while I was standing there this rock come through the window; come down kinder like that, hit the table, and a piece of the rock hit my little boy.

Q. Was that on the re-bound, or was that after it hit the table?

A. After it hit the table.

Q. It first hit the glass?

A. Yes, sir.

Q. Then hit the table?

A. Yes, sir.

Q. Then hit the boy?

A. Yes, sir.

Q. What kind of a rock was it?

A. It was a brown gumbolt or ballast.

Q. It was the same kind of rock that was on the track there?

345 Q. Could a man get that kind of rock by walking down as far as the south end of that platform?

A. Yes sir, all along the track there.

Q. Did it hurt your little boy to any extent?

A. No, it scared him.

Judge FRAZEL: I think that is not admissible.

COURT: As to how bad it hurt the boy that is not material.

Defendant excepted to the ruling of the Court.

Q. Had anyone else, except Mr. Leslie Old had a quarrel in your presence and hearing with your brother that night?

A. No sir.

Q. Had anyone else made any threats against him there?

A. No sir.

Q. Did you look out to see what lights, if any, were on the train after the rock came through?

A. Nothing more than when the caboose passed, I saw it pass.

Q. Any lights about it?

A. Yes.

Q. Any brakeman's lights or conductor's lights?

A. There was a light in the caboose.

Q. Was there any lights ahead of the caboose that you saw?

A. None I seen.

Q. How long after the rock came through was it that you looked out at the train?

A. Well, the rock came through about five cars ahead of the caboose. The caboose looked about that much of being even with me when the rock came through the window.

Q. Did you see any light on the train at that point or a little North of that at that time when you looked out.

A. No sir, none that I could tell. There was a house light straight across in a house. There was a light there but I suppose that was a house.

Q. Mr. Tucker, did you help bring the body of Leslie Old up to the station?

A. Yes, sir.

Q. State whether or not there was any odor or smell of whiskey on him?

A. Yes, sir.

Q. When did you first discover that on him?

A. When I raised him up. When I first went to him.

Q. While he was out on the track?

A. Yes, sir.

Q. Did you see a bottle of whiskey at that time that was found on him?

A. Yes, sir.

Q. Was that corked? Was the cork in it?

A. Yes, sir.

Q. You smelled it on him when you first picked him up?

A. Yes, sir.

Q. Were you about the body any when it was in the station?

A. Yes, sir.

Q. Were you there when Mr. Old vomited?

A. Yes, sir.

Q. Was there any smell of whiskey in that vomit?

A. I could smell whiskey; I couldn't tell whether it was in the vomit, or not. I could smell the whiskey al-right.

Q. Where did that smell of whiskey come from? Who was it on, if anybody?

A. The whiskey scent was on him.

Q. On Leslie Old?

A. Yes, sir.

Q. Did you hear Leslie Old make any statement about how he happened to get hurt?

A. Yes sir, I did.

Q. State what he said?

A. Mr. Holt asked him how he come to get hurt, he said he wanted to catch the train and slipped.

Cross-examination.

Questions by Judge FEAZEL:

Q. Is that all he said?

A. Yes, sir.

Q. Where were you at the time, Mr. Tucker?

A. I was right by him in the depot. It was after they carried him in the depot.

Q. Were you kneeling down with him like Holt was?

A. I was reaching over him, yes sir. He would want to get up and I would reach down and help him up.

Q. He never said anything after that?

A. Yes sir, someone asked me if he was the one that threw the rock through the window and he spoke up and said I am not the one.

Q. Now, was that after or before he——

348 A. That was after he told about how he got hurt.

Q. Do you know where Mr. Holt was at that time?

A. He was present.

Q. How close was he to him?

A. I don't know; I guess five or six feet. He was on one side of him and I was on the other side.

Q. Was he as close to him as you?

A. I think so.

Q. Had the same opportunity of hearing him that you did, did he?

A. Yes sir, Mr. Blakely heard the remarks.

Q. I believe you said a moment ago this rock seemed to come from——no, you saw a light on the train five cars——

A. I never seen any lights.

Q. What was that you said while ago?

A. I said the rock came through the window about five car lengths ahead of the caboose.

Q. How long had you been at the station that night before the train came in?

A. About thirty minutes I guess.

Q. You had been there with your brother all that time?

A. Yes, sir.

Q. Who else was in the station house with him?

A. Just myself and little boy and him is all.

Q. You were in his private office, were you not?

A. Yes, sir.

Q. Please tell the jury whether or not your brother was intoxicated?

A. I don't know. I could smell whiskey on him.

349 Q. Don't you know as a matter of fact he was very much intoxicated before that train came in there.

A. No sir, I don't know it.

Q. Didn't you tell Mr. A. C. Holt your brother was drinking heavy that night?

A. No sir.

Q. Didn't you smell whiskey in his office?

A. I told Mr. Holt that I smelled whiskey on him. Him and Mr. Old was the only ones I could smell any whiskey on.

Q. You didn't tell him then your brother was drinking heavy and you could smell whiskey in his office?

A. I didn't tell him he was drinking heavy. I told him I could smell whiskey on him.

Witness excused.

350 *Testimony of V. V. Blakely.*

V. V. BLAKELY, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

— Mr. Blakely, where do you live?

A. I live in Page, Oklahoma.

Q. What business are you in Mr. Blakely?

A. I am planing mill foreman for the Buchaw-Blackwell Lumber Company.

Q. You are not in the employ of the Kansas City Southern Railway Company?

A. No sir.

Q. How long have you been in the employ of the Buchow-Blackwell Lumber Company?

A. About four years.

Q. Were you at Page on the night that Leslie Old was hurt there at the station or near the station?

A. Yes, sir.

Q. From whom did you first get information that Old was hurt?

A. I got that from my brother, E. B. Blakely.

Q. Did you go out to where Old was lying?

A. No sir.

Q. When did you first see him?

A. I seen him at the depot after he was moved.

Q. Did you help carry him in the depot?

A. No sir.

Q. Were you at the depot when he was brought there?

A. No sir.

351 Q. Do you know how long he had been at the depot when you got there?

A. No sir, not exactly.

Q. Do you know how long after the train passed it was before you saw him at the depot?

A. No sir, not exactly.

Q. Was he alive at the time you saw him?

A. Yes, sir.

Q. State whether or not, Mr. Blakely, you smelled any whiskey upon his breath or about his person?

A. I smelled whiskey but I don't know whether it was on his breath or not. I smelled whiskey in the room. I could state I smelled whiskey.

Q. Could you state whether or not the smell of that whiskey came from his person?

A. Not positively.

Q. Did you see a bottle of whiskey upon him?

A. Yes sir, I seen a bottle of whiskey there.

Q. Do you know whether that came from out of his pocket or not? Did you see it taken out of his pocket?

A. No sir, I didn't see it taken out of his pocket.

Q. Did you hear Mr. Leslie Old make any statement as to how he came to get hurt?

A. Yes, sir.

Q. State what he said?

A. Well, I heard him say the best that I can remember that he went to catch the train and slipped. That is the best of my judgment as to what he said. That is what I understood him

352 to say.

Q. Was that a conversation between him and somebody else?

A. Yes, sir.

Q. Who was the other party?

A. Mr. A. C. Holt.

Q. The man who is here as a witness?

A. Yes, sir.

Q. That is your best recollection of the reply that was made by Mr. Old?

A. Yes, sir.

Q. State whether or not Mr. Holt repeated the statement?

A. Yes, sir.

Q. He repeated it to Mr. Old?

A. Yes, sir.

Q. In what way did he repeat it. Just tell what he said.

A. Well, he repeated it in this way: "Did you catch the train and fall," and Mr. Old says "yes."

Q. Had you heard the preceding part of the conversation that had occurred just before that? Had you heard all of it?

A. No sir, there was a part of it I didn't hear.

Q. Where was Mr. Old at that time?

A. He was in the depot.

Q. About how long before his death was that?

A. I don't know.

Q. Mr. Blakely, did you see the train?

A. No sir, I didn't see the train.

353 Cross-examination.

Questions by Judge FEAZEL:

Q. Mr. Blakely, Mr. Holt and Mr. Tucker were right down in the face of Mr. Old when he said how he got hurt, were they not?

A. I don't — sir.

Q. You don't remember?

A. I don't remember.

Q. Where were you when that statement was made?

A. I was standing there.

Q. Standing up?

A. Yes, sir.

Q. How far from the dying man or hurt man?

A. About four feet I judge.

Q. Close to his feet?

A. No sir, close to one side.

Q. Now at that time wasn't Mr. Holt near and right down on one side and Mr. Tucker on the other?

A. I don't remember.

Q. You don't remember?

A. I remember they were there but I don't remember their position.

Q. Your recollection is he said he got hurt trying to catch the train?

A. Yes, sir.

Q. Are you sure he used the word "train" or "car"?

A. I am not positive but that is my recollection; in other words, that is my judgment as to what he said.

354 Q. Why is it you don't know?

A. He spoke low.

Q. You are not sure you heard the exact words?

A. No sir.

Q. How long did you remain with him after that time?

A. Until he died.

Q. Did he talk to you any after that time?

A. No sir.

Q. Those were the last words the man uttered, were they not?

A. The last words I understood him to say.

Q. The balance of the talk was incoherent or irrational?

A. I couldn't understand him.

Q. He was sinking or dying at that time, wasn't he?

A. I couldn't say. He spoke low.

Q. You say you saw a bottle of whiskey there?

A. Yes, sir.

Q. Would you recognize it if you were to see it again?

A. Yes, sir.

Q. How does this compare with the appearance of that bottle as to the size of the bottle and quantity of whiskey in it?

A. That is the bottle.

Q. You think that is the bottle?

A. Yes, sir.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. Did you hear Mr. Old say after that that the conductor on the train was Harry Eames?

355 A. No sir, I didn't hear that.

Witness excused.

356

Testimony of E. B. Blakely.

E. B. BLAKELY, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Where do you live Mr. Blakely?

A. Page, Oklahoma.

Q. What is your employment?

A. I work for the Buchow-Blackwell Lumber Company.

Q. You are not in the employ of the Kansas City Southern Railway Company?

A. No sir.

Q. How long have you worked for the Buchow-Blackwell Lumber Company?

A. About seven years.

Q. What kind of work do you do?

A. Grade lumber.

Q. Were you at Page, Oklahoma, the night that Leslie Old was hurt there?

A. Yes, sir.

Q. Were you up at the station at the time that train passed?

A. No sir.

Q. When did you first learn that Old was injured? I mean with reference to where he was? Where was he when you first learned of his injuries?

A. He was on the track.

Q. Did you go to him while he was on the track?

A. Yes, sir.

Q. Who was there when you got there?

A. Mr. Holt.

357 Q. Mr. A. C. Holt?

A. Yes sir, and Mr. George Tucker and Mr. Bent Tucker. I believe that was all.

Q. Who carried Leslie Old to the station?

A. The same parties that I mentioned just now, and myself and two or three others.

Q. State whether or not you smelled an odor of whiskey on the breath of Mr. Old or about his person?

A. Yes, sir.

Q. Where was he at the time you first discovered that odor of whiskey on him?

A. He was on the track.

Q. Did you see any whiskey in a bottle?

A. Yes, sir.

Q. Would you recognize the bottle if you were to see it again?

A. I don't know.

Q. Will you look at the bottle on the table before you and state whether or not that looks like the bottle? Was it a bottle similar to that?

A. I don't know. Well, yes, it was similar.

Q. But whether that is the identical bottle you wouldn't be able to tell?

A. No.

Q. Mr. Blakely, did you hear Mr. Old make any statement as to giving his name, or anything else, before he was taken into the station?

A. Yes, sir.

Q. What did he say?

358 A. He told his name, told where he lived and told that he had a brother in Heaven.

Q. Was anything said about his father, as to where he lived?

A. Well, I think his parents lived in Idabel.

Q. Idabel, Oklahoma?

A. Yes, sir.

Q. Did he make any statement there in the station as to how he got hurt?

A. Yes, sir.

Q. State what he said?

A. He said he tried to catch the train and slipped.

Cross-examination.

Questions by Judge FEAZEL:

Q. Mr. Blakely, where were you when he made that statement? How far from him, in other words?

A. I was right close to him.

Q. Were you standing, sitting or leaning over?

A. I was standing.

Q. Where was your brother *that* as you have just testified?

A. I don't remember whether he was there or not.

Q. Was Holt there—Alf Holt or A. G. Holt?

A. Yes, sir.

Q. Was Mr. Tucker there?

A. Yes, sir.

Q. Holt and Tucker were leaning down on the floor right over him, were they not?

A. I don't remember in what position they were.

Q. He spoke very slowly, did he?

359 A. Yes, sir.

Q. Are you sure you understood him to say the word "train" or "car" or which?

A. Well, Mr. Holt asked him if he tried to catch the train and slipped and he said he did, and then he asked him if it was the caboose or train and he said it was the train.

Q. He said it was the train?

A. Yes, sir.

Witness excused.

360

Testimony of W. J. Old.

W. J. OLD, the next witness called on behalf of the defendant after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Old, you were familiar with your son Leslie's hand writing?

A. Yes, sir.

Q. I wish you would examine that and see if that is his handwriting and note the signature and filling out of the blanks in it? You will find some signatures on the back of it also.

A. Yes sir, the best of my knowledge that is his hand writing.

Mr. McDONOUGH: I offer to introduce it.

Judge FEAZEL: What is his name?

A. Leslie A. Old.

Q. How do you spell it?

A. Leslie A. O-l-d.

Q. I see this spelled O-l-d-s. Are you sure this is his handwriting?

A. It looks like his hand writing but his name is not correctly spelled. It is spelled O-l-d.

Mr. McDONOUGH: I now offer it in evidence, your honor.

Judge FEAZEL: I want to raise a formal objection to it. I don't know that there is anything there material but I want to object to it. For one reason I don't think it has been properly authenticated. The witness says it just looks like his hand writing, and on the other side it couldn't bear on his case except his experience.

361

Mr. McDONOUGH: That is what it is introduced for. I think it is sufficiently identified to let it go it.

Court: You object to it or not.

Judge FEAZEL: I want to offer a formal objection to it. As I said to the Court a moment ago the objection I urged to it, it isn't sufficiently shown to be his hand writing, and it wouldn't have any bearing upon his case except for his experience or lack of experience and that might entitle it to go to the jury if it was sufficiently identified.

Mr. McDONOUGH: I think it is sufficiently identified.

Court: I think the identification is sufficient for it to go to the jury. Are you willing for it to go to the jury to be considered by them in determining the amount of experience he had?

Judge FEAZEL: For that purpose only.

Court: Very well, it is introduced without objection, for the purpose only of being considered by the jury in determining the length of experience deceased had had.

It it here introduced and marked Exhibit A to the testimony of W. J. Old.

(Here follows application blank, marked page 362.)

Witness: { J. F. Noech
Clerk

363 Judge FEAZEL: There is a good deal in there that has nothing to do with it, but there is no need for any of the rest of that to go before that.

Mr. McDONOUGH: Here is the point so far as my judgment is concerned it is admissible, not only for the purpose of showing the amount of his experience, but for the purpose of showing that he has wilfully violated the rules on that night and tending to establish negligence on his part. Of course if the court excludes it for that all I can do is to save my exceptions. I think when a man enters upon an employ with the knowledge that it is against the rules to use intoxicating liquors and then uses intoxicating liquors that is a fact admissible to show whether or not he was in the exercise of due care. At the time I was before mentioning it that didn't occur to me. I want to say frankly and I say it is extremely highly material and important on that point.

COURT: Except by that I have said before I am not going to let that go in at all.

Judge FEAZEL: There is no question but what under the law there this application is inadmissible, and I want to object to the whole of it. I object to the statement entirely.

Mr. McDONOUGH: I offer it now if the Court please. I don't think this decides the question in it. There are two points that are not discussed there, one is that the plaintiff here raise the question of the experience of the deceased; another statement is on the same line. It is alleged in the complaint and relied on by the evidence here
evidently that they expect to claim that this man was not
364 experienced. His own statement or his signature shows that he was. They have introduced proof which they claim will tend to show he was not.

COURT: This question of a statement of the deceased over his signature was held inadmissible in the case of Murphy v. Ry. Company in 92nd Arkansas. I think that would be inadmissible under that decision. The objection will be sustained.

Mr. McDONOUGH: Now, the Court sustains the objection of plaintiff to the introduction of the written statement, as I understand it, upon the ground it is inadmissible and not upon the ground it was not signed by Leslie Old.

COURT: Yes, sir.

Mr. McDONOUGH: Now, I save an exception to that ruling; then I offer in evidence that part of the statement which shows the age of the deceased, and which shows his description, the name of his mother, the name of his wife and the amount of his experience. I offer these together and separately upon the theory that both of said statements are admissible in view of the issues in this case and each of them.

COURT: You object to those? (Speaking for Judge Feazel.)

Judge FEAZEL: Yes sir.

COURT: Objection sustained.

Mr. McDONOUGH: Now, I offer the statement of Leslie Old, the deceased, dated October 11th, 1912, in which he states that E. S. Hill of Heavener, Oklahoma, has duly informed him of the duties



connected with the employment of brakeman and explained to him that they will expose him to great dangers. I offer that
 365 competent and relevant in this case, and I desire to call the attention of the court to the fact that the Supreme Court of the United States has held, that in cases of this kind, recovery is based solely and exclusively upon the Federal law, and no State statute has any bearing upon the question; therefore, if no State statute has no bearing upon the question at all, and under the Federal law, all of this evidence and all of this statement, and each part of it, is admissible as testimony tending to show that the Plaintiff was experienced and that he had had sufficient experience. If this testimony. The decisions of the Federal Court doesn't control the jury all testimony tending to show he was without experience.

COURT: That instrument, all parts of it, is excluded as hearsay testimony. The decisions of the Federal Court doesn't control the competency of testimony in State courts. The jury will not consider that instrument for any purpose in their deliberation of anything that has been said with reference to it.

Judge FRAZEL: Now I want to move to exclude all the testimony of Mr. Holt and Mr. Tucker and the two Blakelies as to the statement made by Leslie Old after his injury as to how he got hurt. I do that upon this theory: The court will remember that in the Carroll case which went up from Howard County, that was a suit for the benefit of the estate and also for the benefit of the next of kin and that some question or the same question arose in that case. The Supreme Court held that it was admissible as far as the estate was concerned but was inadmissible so far as the beneficiaries
 366 were concerned, and inasmuch as counsel didn't offer to limit it to an action in behalf of the estate the court committed no error in excluding it entirely. Now in this case, the Statute upon which this suit is brought provides this recovery, if any is had, shall be for the benefit of the wife and children, if there be any; if not next kin who is dependent on them for support. So to take that view of the case there can be no possible benefit accruing whatever to the estate of Leslie Old in this case, and for that reason all of these statements are inadmissible, and ask the Court to exclude them from the jury.

COURT: I would have excluded those at the time they were offered if you had objected. Gentlemen, that part of the testimony of these witnesses designated here as to any statements made by Leslie Old as to how he received his injury before the time he died will be excluded from your consideration. You will not consider them for any purpose in making up your verdict.

Mr. McDONOUGH: In order to have the record clear, I would like the court to designate what is excluded and let the stenographer take down what you say.

COURT: All testimony relative to statements made by Leslie Old between the time he received the injury and the time of his death as to how he was injured are excluded from the consideration of the jury.

367 Mr. McDONOUGH: I save an exception:

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Witness Excused.

368 *Testimony of C. W. Black.*

C. W. BLACK, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Black, you were on the witness stand the other day in this case, were you?

A. Yes, sir.

Q. What did you say your position was with the Kansas City Southern?

A. Car Foreman.

Q. You were where at the time Leslie Old was hurt? Where were you?

A. Well, I was at home.

Q. I believe you stated to Judge Feazel the other day that you were called down there to examine the train?

A. Yes, sir.

Q. Did you make out a list of the car numbers with the initials in the order in which they stood in the train?

A. Yes sir. Well, Mr. Monroe took the numbers of the cars. He was with me.

Q. I show you a list and ask you if that is a list of the cars in the train and the order in which they set when you examined it at Heavener, Oklahoma?

A. Yes sir, that is a copy of the list.

Q. What was the number of the engine if you remember?

A. 704 I believe was the engine.

Q. You remember the number of the caboose?

A. 534 if I remember right.

Q. This list, does it or does it not show the cars as they — placed beginning with the caboose and running up to the engine?

369 A. Yes, sir.

Mr. McDONOUGH: Now, I offer to introduce it.

Judge FEAZEL: If the court please, I think the original record would be the best testimony, but I am not going to object to this. He can introduce it if he wants to.

COURT: Very well.

It is here introduced and marked Exhibit A to the testimony of Mr. Black.

Q. Mr. Black, did you examine the wheels for blood on S. F. R. D. car, refrigerator car number 6239 at the time you made that inspection?

A. 6239 was a —

Q. The Santa Fe refrigerator car being the one next to the National Zinc car number 17?

A. Yes, sir.

Q. Did you find any blood on any of the wheels of that refrigerator car?

A. No sir.

Q. Did you examine the wheels of National Zinc car number 17?

A. Yes, sir.

Q. Did you find any blood on those wheels?

A. No sir.

Q. Did you examine the hand rails on National Zinc car Number 17?

A. Yes, sir.

370 Q. Describe the construction of that car?

A. It was a small tank car, nine hand railings on the outer edge of the car. The tank set back from the end sill, leaving the platform between the end of the tank and the end of the car and it had a grab iron on the end sill at each corner of the car.

Q. Where did the refrigerator car have a ladder, if anywhere?

A. It had hand holds down the side on the corner from the roof down to the sill steps.

Q. Did those cars belong to the Kansas City Southern Railway Company?

A. No sir.

Q. Was there any defect in the hand hold of those cars?

A. No sir.

Q. State whether or not a man who was six feet tall and with fairly long arms and legs could pass, using due care, from the ladder of the refrigerator car onto that National Zinc car?

COURT: I expect it would be fair to let him state the distance, then let the jury determine. State the distance between those.

Mr. McDONOUGH: The Court sustains the objection.

COURT: I think so.

Mr. McDONOUGH: I save an exception. As to being qualified as an expert I think the plaintiff qualified him the other day on the stand.

Judge FEAZEL: I didn't qualify him as an expert at all.

371 Mr. McDONOUGH: I will save my exception now, and examine him.

Q. How long have you been in the kind of work that you are in now?

A. About twelve years.

Q. What are your duties?

A. At the present time?

Q. Yes, and during that twelve years?

A. Well, I repair cars, and have been in charge of car management.

Q. Are you called upon to make any inspection of the cars?

A. Yes, sir.

Q. Are you called upon to determine in the course of your duties whether or not a car is in repair and whether or not it needs repair?

A. Yes, sir.

Q. Are you familiar with the kind of hand rails that are being used by railroads generally throughout this country?

A. Yes, sir.

Q. State whether or not the railroads generally throughout this country are using cars, refrigerator cars with hand holds down the side near the end?

A. Yes sir, they—

Q. Such as that refrigerator car had on it?

A. Yes sir, they have hand holds down the side.

Q. State whether or not the railroads generally are using cars like that National Zinc car number 17 with hand holds on it as they were at that time.

A. Yes sir, they used them.

372 Q. Have you ever seen the National Zinc car with any other hand holds upon it other than those that are upon that car?

A. Well, I don't remember as I have.

Q. What kind of a car is the National Zinc car? What is it for.

A. It is a tank car. It handles chemicals. It is not an oil car. It handles acids if I remember the Zinc company right.

Q. If you were acting as inspector state whether or not you would be authorized to decline to receive that car under your instructions and under your duties if it came to you with hand holds as that car had?

Judge FEAZEL: Let him change that from the instructions he received from his superiors, or in other words, the defendant. If he limits it to that I have no objection to the question.

Q. I will ask you further to qualify you whether or not the railroads in this country receive cars like that National Zinc car with hand holds and ladders on it like they were on that car at that time?

A. Yes sir, they receive them.

Q. Now, under your instructions and duties state whether or not you could decline to receive that car if it had hand holds as you found on it?

A. Not, if that car come to us from one road to others we would have to receive it as it was.

COURT: You mean that was your instructions from your superiors?

A. Yes sir—well, that is the instructions under the M. C.

B. A.

373 Q. Master Car Builders' Ruling?

A. Yes, sir.

Q. Now, what is the Master Car Builders Association?

A. All the roads combined have to work—well, to work to one another's interest, like repairing cars, etc. keep track of cars, tell what to do on them and how much to do and so on. Well, that could come under the head of Interstate Commerce, too.

Judge FEAZEL: Hold on, you needn't be telling about interstate commerce.

Mr. McDONOUGH: I think it is admissible.

Judge FEAZEL: Now, he says he gets those instructions from the rules adopted by the Master Builders' Association. The jury has got a right to see them. They are in possession of them and before he has got a right to show what instructions he works under, those rules, I want to see them. In other words he can't tell those rules. I want to move to exclude his testimony on that line for that reason.

COURT: Well, I think that part of his testimony as to what these rules are, I think the best way would be to prove that by the rules themselves.

Mr. McDONOUGH: I don't think it is dependent upon the rules. I waive that, but I think his testimony is admissible upon the other grounds, but as to the rules, I waive that now.

Cross-examination.

Questions propounded by Judge FEAZEL:

Q. Have you got the rules of the Master Car Builders' Association?

374 A. No sir.

Q. Have you got them here in town?

A. No sir.

Q. Any of the railroad people got them that you know of?

A. Not as I know of.

Q. I believe you stated that most refrigerator cars operated in this country have side ladders just like this one had?

A. Well, the majority.

Q. Don't they also have ladders on the side and end too?

A. There is some.

Q. Don't the majority have both side and end ladders?

A. I think the majority of them will be the other way.

Q. Let's suppose this is a car (indicating), the side ladder you spoke of is on the front end of the car on the right hand side, isn't it; that is, the way the car is going?

A. Yes, sir.

Q. That has a side ladder down somewhere near the end?

A. Yes, sir.

Q. Now those refrigerator cars, in addition to that side ladder, don't they have another end ladder just on the other turn of the car, the end of the car?

A. If this ladder is down the side, why if it had an end ladder it would come right down there.

Q. Don't the majority of those have end ladders in connection with the side ladders?

A. No, not a majority of them.

375 Q. Don't a great many of them?

A. No.

Q. Have you noticed trains passing upon this road lately with refrigerator cars?

A. No sir, not lately.

Q. When did you notice any of them last?

A. In the Mena yards I think last Sunday.

Q. How many refrigerator cars were in that train that you noticed?

A. Well, they wasn't in the train that I noticed.

Q. How many trains did you find in the yards?

A. I think eight or nine.

Q. How many in the yard had end ladders?

A. I don't remember of seeing two in the bunch that had end ladders.

Q. Those had side and end ladders?

A. Yes, sir.

Q. What company did they belong to?

A. I couldn't say.

Q. What were the initials on them: W. F. T. or S. F. R. D. or what were they?

A. I couldn't say. There was several different classes of Freezers in the yard.

Q. You said, under your instructions from your company, you wouldn't be authorized as a car inspector to decline a car equipped as this refrigerator car was?

A. No sir.

Q. You have already stated the grab iron that refrigerator car had was one down near the bottom near the end.

A. Yes, sir.

Q. How long would it have taken you to put one on the top there to answer as a hand hold if you had been inspecting there?

A. Well, the car would have to be shopped.

Q. What do you call shopping?

A. Take it out of the yards and put it on the repair tracks.

Q. That is what you do when you repair any of them?

A. Well, just for minor repairs you don't.

Q. How long is that grab iron usually?

A. From sixteen to eighteen inches.

Q. How big is it?

A. Five eight-s of an inch.

Q. Through?

A. Yes sir, five-eight-s rod.

Q. The ends already crooked so as to go on the car?

A. Yes, sir.

Q. The holes already made to put the bolt in?

A. Yes, sir.

Q. Now, how long would it take you to make it?

A. I judge it would take about thirty minutes to put one on.

Q. Now when you come to a car of that kind instead of sending it on its journey why couldn't you put another iron up there to answer as a hand hold.

A. It is not required to do it.

Q. Your company doesn't require it?

A. No sir.

377 Q. You say the railroad companies in this country don't receive these cars with one grab iron at the bottom?

A. Yes, sir.

Q. What companies have you worked for besides the Kansas City Southern?

A. The Santa Fe.

Q. How long since?

A. About eleven years ago.

Q. You haven't worked for the Santa Fe since eleven years?

A. No sir.

Q. You have been with this company since that time?

A. Yes, sir.

Q. Then, how do you know what the other companies are doing?

A. Just by handling lots of other cars?

Q. That is the only means you have of knowing what they receive and what they refuse to receive?

A. Yes, sir.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. Did you have any authority from anybody to put on those extra hand holds when you found them as this hand hold is?

A. No sir, I have no authority to put them on.

Q. Mr. Black, state whether or not, taking your experience into consideration, a brakeman can go safely from one of those refrigerator cars with the ladder near the end on the side to one of those National Zinc cars?

378 A. Well, I will say it is more difficult to go from a car that is constructed that way than it is any other car because it makes a little longer reach.

Q. But the reach can be made?

A. Yes, I suppose it has been made by many a man, I suppose.

Q. Haven't you tried it yourself?

A. No.

Q. You never tried to reach from a refrigerator car, S. F. R. D., to a National Zinc car?

A. No, I never tried to reach it.

Q. You never acted as brakeman?

A. No.

Q. What is your height?

A. Five feet, seven and a half.

Q. What is your reach with your arms? Do you know?

A. Well, it is about, I think about seven feet and a half. By a stretch you might call it eight feet by tipping and stretching. That is by this way (Indicating).

Q. Well, I mean from hand to hand, with your arms extended horizontally?

A. About five feet. You mean this way? (Indicating.)

Q. Yes.

A. About five feet or a little over.

Q. A refrigerator car of that kind has how many hand holds on the ends, that is, where the ladders is in the side?

A. Two; one on each corner.

Q. Then, how would you go from a refrigerator car that had that ladder on the side to a National Zinc car?

A. I would come down the side, and when I got down level
379 where I thought it was low enough, I would step over to the tank.

Q. You can reach from the refrigerator car to the railing of the National Zinc car without turning loose the refrigerator car, can you not, have you tried it?

A. No sir, I never tried it. I couldn't say.

Q. How much of a platform is there on these Zinc cars?

A. Well, I should judge about—it is three feet,—thirty-six inches from the end sill, to the end of the tank, that would leave a platform of three feet, just about that.

Q. What time was it when you examined those cars, including that Zinc car and the refrigerator car?

A. If I remember right, somewhere about eleven o'clock at night; somewhere in the neighborhood of eleven.

Q. Who examined them with you?

A. J. T. Monroe.

Q. An inspector there?

A. Night inspector.

Recross-examination.

Questions by Judge FEAZEL:

Q. Mr. Black, I understood you to say a moment ago that you thought it would be more difficult to make the passage from this refrigerator car to a tank car by coming down the side ladder and reaching over for the railing on the tank car than it would be to come down the end ladder on the refrigerator car and step over?

Did I understand you that way?

380 A. I don't think I mentioned coming down the end. I said to come from the side and step on the tank.

Q. Is it not true that it would be less dangerous to a brakeman in making that passage to come down the end ladder here and step straight across to the platform of the tank car?

A. Yes sir, he would be closer, and it stands to reason it would be safer.

Q. Isn't there another reason besides the fact he would be closer? Suppose his foot was to slip on this side ladder, there is nothing to keep it from slipping back?

A. No sir.

Q. Whereas, if he was to use the end ladder, he would have the end of the car to press his foot against?

A. Yes, sir.

Q. Now, I believe you stated you examined the wheels, you and Mr. Monroe, of this refrigerator car and also the wheels of the tank car immediately in front of it?

A. Yes, sir.

Q. What other wheels did you examine?

A. I looked at the wheels all down back to the caboose.

Q. You didn't examine any wheels in front of the tank car?

A. I examined more particularly down from them cars back.

Q. Why?

A. Because there is where he was seen last.

Q. Now then, how far had that train travelled before you made the examination after the man was injured?

381 A. Well, from Page to Heaven. I forget the miles.

Q. Isn't it about seventeen or eighteen miles?

A. I should judge something like that.

Q. Isn't it true, the train, in running that distance, if it had any blood on it to start, would be off of it before it could go that distance? It would be obliterated before it could go that distance?

A. Looks like it would.

Witness excused.

382

Testimony of Dr. C. Cochran.

Dr. C. COCHRAN, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Where do you live, Dr. Cochran?

A. At Mena, Arkansas.

Q. Are you local surgeon of the Employers' Hospital Association of the Kansas City Southern?

A. Yes, sir.

Q. Were you called to go to Page on the 24th of March last to see or to treat Leslie Old?

A. I think that was the date. On or about that time; I think it was the 25th.

Q. Did you go?

A. Yes, sir.

Q. Where did you find the body?

A. I found the body in the depot or in the baggage room of the depot when I arrived there.

Q. Was he alive or dead when you got there?

A. He was dead.

Q. State whether or not, Doctor, there was, upon his person, any odor of whiskey when you got there?

A. I don't remember that there was.

Q. Did you see any whiskey about the body?

A. Yes, sir, I found a bottle of whiskey on the body. It wasn't full, but there was some whiskey in the bottle; two-thirds full probably.

383 Q. Would you know the bottle again if you should see it?

A. I don't know.

Q. Do you know whether that is the bottle setting in front of you on the table?

A. Well, there was a bottle about that size, but if I remember correctly there was a label on one side of it, but I think that is about the size of the bottle, and that is about the quantity that was gone out of the bottle.

Q. How was he injured? That is, I mean by that, describe the injuries you found? In what parts of the body.

A. Well, I found both of the limbs had been cut off just about the ankle or above the ankle, and the left hand was crushed off or cut off about where I put my hand here (indicating), and then there was an injury across the shoulder. The back part of the chest or rib seemed to be crushed through, and the scapula or shoulder blade was broken through.

Q. Did you find any bones, or were any bones shown you there that had come from his body?

A. Well, we went out on the railroad track where the injury occurred, and picked up some small bones, fragments of bones.

Q. From what part of the body had those bones come?

A. They had come from probably the large bone or tibia of the leg; that is the lower part.

A. As to the injury to the legs where the legs were cut state whether or not the cut was such a cut as would result from the wheels of a car running over the legs?

384 A. Yes sir, it would be just such an injury.

Q. As to the injury on the hand state whether or not that appeared to be an injury due to the wheels running over the hands or something else?

A. Well, I couldn't say it was the wheel run over the hand, but it was barely amputated, just a little of the tissues of the skin holding it if I remember correctly.

Q. As to the injuries in the shoulder could you tell whether or not that was due to the wheels or something else?

A. I didn't think that was the wheels that done that injury. It must have been crushed some other way because if the wheel had went over it it would have crushed his life out instantly there.

Cross-examination.

Questions by Judge FRAZEL:

Q. Doctor, what is under a train, what part of the gearing under the ordinary freight train could have crushed his shoulder like you found it there, the brake beam or something of that kind?

A. I couldn't say.

Q. How close to the brake beams come to the track or ties?

A. I couldn't say exactly.

Q. It wouldn't run over a man's body without touching it would it?

A. Well, some of them would.

385 Q. That injury to the hand, part of that hand being crushed off, that could be done by the coupling apparatus in there or draw heads, couldn't it?

A. It might be, yes sir.

Q. I believe you say you are Local surgeon for the company?

A. Yes, sir.

Q. How long have you been acting in that capacity?

A. Oh, this last time nearly two years.

Q. Did you ever work for them before?

A. Yes, sir.

Q. Where, at the same place?

A. I resigned there.

Q. You have been engaged in that kind of business for a number of years, have you not?

A. Yes, sir.

Q. You have been surgeon for different railroads all over the country have you not?

A. Yes, sir.

Q. How much experience have you had along that line?

A. I have been connected with the railroads thirty years.

Q. What other roads did you work for besides this?

A. Birmingham, Union Pacific.

Q. I believe I understood you to say you smelled whiskey but you didn't know where it came from?

A. No sir, I don't think I said I smelled any whiskey.

Q. I beg your pardon, Doctor, I got you mixed up with some other witness.

386 Redirect examination.

Questions by Mr. McDONOUGH:

Q. Did you smell it, Doctor.

A. I don't remember that I did.

Witness excused.

387

Testimony of Chas. N. Swanson.

CHARLES N. SWANSON, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Where do you live, Mr. Swanson?

A. Topeka, Kansas.

Q. What business are you in?

A. I am Superintendent of the car shops for the Santa Fe.

Q. What company?

A. Santa Fe Railroad Company.

Q. Is the matter of the refrigerator cars known as the S. F. R. D. cars under your jurisdiction?

A. Yes, sir.

Q. Are you familiar with the history of the S. F. R. D. cars including number 6239?

A. Yes, sir.

Q. I wish you would state whether or not that car, the car number of that car was in service on and before July 1st, 1911?

A. It was.

Q. State whether or not since that date that car has been shopped for repairs?

A. Not for general repairs.

Q. Mr. Swanson, state whether or not those refrigerator cars that have not been shopped for repairs and that were in service on July 1st, 1911, have side ladders and end ladders on the cars?

A. They have the side ladders but no end ladders.

Q. Are you familiar with the construction of the ladders as they are on those cars?

A. Yes, sir.

Q. State whether or not, in your opinion, a brakeman, using due care, in passing from one of those cars to a National Zinc car, passing down the side near the end, can pass in safety from a refrigerator car to a National Zinc car, using due care himself?

Judge FEAZEL: The witness hasn't shown he has had any experience along that line.

Q. What experience have you had, if any, in the matter of constructing those cars and the use of them?

A. I have been in the business for thirty years and during that period I have worked on all classes, and had charge of men who have worked on all classes of freight and passenger equipments.

Q. Are you also familiar to any extent with the National Zinc cars?

A. We have handled them. We have had them in our shops.

Q. Mr. Swanson, taking those refrigerator cars of that number and that were in service on July 1st, 1911, and before that, state whether or not, under the rules and regulations between the railroads throughout the entire country, any railroad has the right to refuse those cars by reason of their not having end ladders?

Judge FEAZEL: We object to that.

Court: Have a right from whom?

Mr. McDONOUGH: Has any right from either your company or any other company?

A. To refuse the cars?

389 Q. Yes, sir.

A. No sir, they comply with the law the way they are.

Judge FEAZEL: I ask the court to exclude his statement.

Court: Yes, that is not competent.

Mr. McDONOUGH: The witness can't testify what the law is but the witness may know whether or not a car comply-s with the law.

Court: It is for the witness to tell how the cars are. The Court will tell what the law is.

Defendant excepted to the ruling of the Court.

Q. Mr. Swanson, is there any danger in passing from one of those cars, refrigerator cars with a ladder down the side, and the brakeman using due care onto one of those National Zinc cars?

A. No sir.

Q. Is there any unusual danger by reason of the absence of an end ladder?

A. No sir.

Q. Describe how a brakeman would go from a refrigerator car to a National Zinc car equipped as those cars are now?

A. Well, he would go down the side ladder until he was on the last ladder tread of the car, then he would step over the end ladder tread of the refrigerator car. He would maintain his hold with his left hand on the ladder of the refrigerator car and reach over with his right hand to the hand railing of the Zinc car.

Q. Have you examined in the yards here at Ashdown a refrigerator car of that size connected with a National Zinc car of the
390 kind I have asked you about?

A. I have.

Q. Have you tried that car to see whether or not a brakeman, or anybody else might pass from the refrigerator car, as you have described, to the National Zinc car without turning loose his hold on the refrigerator car?

A. Yes, sir.

Q. Can it be done?

A. Yes, sir.

Q. Those cars are in the yard over here by the station now?

A. Yes, sir.

Q. You have examined them there?

A. Yes, sir.

Q. Is your car; that is, the refrigerator car there, the same make and frame and build as S. F. R. D. number 6239?

A. Yes, sir.

Cross-examination.

Questions by Judge FRAZEL:

Q. Mr. Swanson, suppose now when you were making the passage from this side ladder over to the end of the tank car there should be a terrible lurching or jerking of the train, what might be the probabilities as to the fate of the brakeman then?

A. Well, if I was a brakeman I would——

Q. If in trying to make that passage there should be a terrible lurching and jerking of the train, wouldn't his chances of falling or slipping be greater than if he went down the end ladder on that car?

A. I can't say that they would.

391 Q. Did you ever serve in the capacity of a brakeman?

A. No sir.

Q. You never had a day's experience as brakeman?

A. No sir.

Q. Nor as a switchman?

A. No sir.

Q. The only work you have ever done in the railroad service then is that of construction?

A. Yes, sir.

Q. And repair work?

A. Yes, sir.

Q. You say the S. F. R. D. cars have no end ladders?

A. No, this particular car hasn't.

Q. How is the series though as a whole? What per cent has end ladders?

A. That I couldn't say.

Q. Give us your best judgment?

A. We are now equipping cars with end ladders as well as side ladders.

Q. End ladders and side ladders both?

A. Yes, sir. Up to date I would say we have twenty per cent of our cars equipped.

Q. Equipped that way?

A. Yes, sir.

Q. Are you a member of the Master Car Builders' Association?

A. Yes, sir.

Q. Have you got the rules of that association with you?

A. No sir, I have not.

392 Q. Do you know of anybody got them here?

A. I do not.

Q. I believe you said in response to a question from Brother McDonough this particular refrigerator car had been in the shop but not for general repairs?

A. Not for general repairs.

Q. Have you a personal recollection of that or do you speak from the records?

A. I looked up the record of the car.

Q. Have you got that record with you?

A. I have not.

Q. Do I understand you to say you are testifying solely from the record or any recollection on your part?

A. I would say in answer, if the car had been in for general repairs our records would show that it had the end ladder irons supplied.

Q. You are testifying entirely from what your records show or does not show, and not from your personal knowledge?

A. Not from my personal knowledge except the record.

Judge FEAZEL: It seems it is entirely incompetent.

COURT: I will admit it. Let it go to the jury.

Plaintiff excepted to the ruling of the Court.

Witness excused.

393

Testimony of R. E. Coleman.

R. E. COLEMAN, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Coleman, where do you live?

A. In Kansas City, Kansas.

Q. What is your business?

A. I am employed by the National Zinc Company.

Q. In what capacity are you employed by that company?

A. I am their purchasing agent, and I also attend to their shipping and weighing of stuff shipped.

Q. Are you familiar with the construction of the cars of the National Zinc Company?

A. Yes, sir.

Q. Those cars are known by what name?

A. National Zinc Company.

Q. What are the cars used for?

A. Shipping acid. Shipping sulphuric acid.

Q. Are they used for shipping oil?

A. No sir.

Q. I wish you would describe a car of your company similar to the National Zinc car number seventeen? Give a description of the car I mentioned as near as you can?

A. Well, it is a tank about five and a half feet in diameter and about twenty-four feet long, on a wood under frame car. There is a platform eight inches wide and about thirty-two feet long. There is a space between the end of the tank and the end of the car or end of platform of about three feet, two inches.

394 Q. Is there any hand railing on the car?

A. Yes, sir, on both sides.

Q. Where is that placed?

A. On both sides on the side sills.

Q. Describe that hand railing?

A. Well, I am not sure as to the number of posts, up-right posts. I think there is five or maybe six, I am not sure as to the numbers, about two feet and a half high, and then, through the top of this post, there is holes for about seven-eights of a rod that runs all the way along each side. That railing comes to within twenty-four inches of the end of the body of the car.

Q. Now, what handles or grab irons are on the car, if any?

A. There is two on each end sill about twelve inches from the side. They are made of five-eights round iron, not less than fourteen inches wide and standing out about two inches from the body of the car and two and a half—from two to two and a half. Then there is one on each side sill.

Q. Near the end?

A. Yes sir, about twelve inches from the end, just above the foot rest or where you place your feet to get down.

Q. What do you mean by the foot rest?

A. It is a kind of a stirrup fastened to the end or side sill at the end to put your feet in to step upon the car.

Q. And this grab iron is just above that?

A. Yes, sir.

395 Q. Mr. Coleman, what experience, if any, have you had in handling or constructing or using those National Zinc cars, if any?

A. I don't know that I understand what you mean.

Q. I mean what experience in using them in business, or in handling them, or in your knowledge of handling them or by having them handled by men under you as to how they are used by a brakeman on a train in passing from one car to another car. What experience have you had, if any, in using those cars or in knowing their use?

A. Well, I have stepped over from one car to another myself; climbed from one car to another a great many times and I have also climbed from a box car onto a tank car.

Q. How long have you been connected with the National Zinc Company?

A. Since the first of January with the National Zinc Company proper.

Q. How long have you been acquainted with the construction of the National Zinc Cars

A. Eleven years.

Q. In that experience state whether or not it was a part of your duty to determine the question of whether or not the hand holds and railings that were used on those cars were safe and proper for brakemen and other trainmen in using the cars?

A. Yes, sir, it was part of my duty to see that they were properly put out.

396 Q. State whether or not, in your opinion, the hand holds and railings as you have described are safe to enable a brakeman in going from a refrigerator Santa Fe car to a National Zinc car?

A. I consider it so, yes, sir.

Q. Have you examined in the yards here at Ashdown today, National Zinc car connected with the Santa Fe refrigerator car?

A. Yes, sir.

Q. Did you make an effort to go from the refrigerator car from the ladder on the side over to the National Zinc car?

A. Yes, sir.

Q. In making that passage, state whether or not you could reach the National Zinc car with your right hand and still hold onto the hand holds on the refrigerator car?

A. Yes, sir, I could.

Q. About what is your height

A. Five feet, eight.

Q. State whether or not National Zinc Car number seventeen was in service on and before July 1st, 1911?

A. Yes, sir, it was.

Q. State whether or not that car since that day has been in the shops for repairs?

A. No, sir, it has not.

Q. Can a brakeman, in your opinion, pass safely from a refrigerator car, Sante Fe refrigerator to a National Zinc car like National Zinc car number seventeen, using due care on his part, in safety?

A. Yes, sir, I think so.

397 Q. State whether or not this National Zinc car which you examined here is the same kind of a car, or different, or the same construction or different as National Zinc car number seventeen?

A. It is practically the same. Identical so far as I know. It is supposed to be identical.

Cross-examination.

Questions propounded by Judge FEAZEL:

Q. Mr. Coleman, when did you make the experiment to ascertain if you could step from the side ladder of the refrigerator car to the platform of the Zinc or tank car?

A. Just after noon today.

Q. The cars were standing still?

A. Yes, sir.

Q. How was the slack between the cars? Do you know whether that was taken up?

A. Yes, I noticed. The springs seemed to be pulled up. There seemed to be the maximum amount of space there would be between two cars.

Q. How close did the railing on the side you spoke of lack coming to the end of the platform?

A. Twenty-four inches.

Q. What is the usual distance now between the ends of two cars when they are coupled up and running?

A. Thirty inches. I measured it.

Q. Thirty inches between the wood work of the two cars?

A. Yes, sir.

398 Q. Thirty and twenty-four would be how many?

A. Fifty-four.

Q. How far now was the end ladder that you were on from the end of the car that you made the measurement from?

A. On the refrigerator car?

Q. Yes.

A. Four inches.

Q. And the other space was fifty-four and add four to that and you would have fifty-eight inches?

A. Yes, sir.

Q. Now, if a train was running, do you think it would be entirely safe to make the passage you have just described?

A. Yes, sir.

Q. Suppose the train during that time was lurching and jerking wouldn't his chances of falling and slipping on that side ladder be much greater than it would be on an end ladder?

A. Yes, sir, I think it would.

Q. Then, if those conditions obtained, you think the end ladder would be safer to make the passage than the side ladder?

A. In my opinion it would, yes, sir.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. That would depend upon the make of the car, would it not?

399 A. The make of what car?

Q. The make of the refrigerator car. To make my question clear to you, if this refrigerator car that is here in the yard had an end ladder on it and the brakeman attempted to come down on that end ladder and get off on that National Zinc car would he not be further from the hand railing on the Zinc car than he would be if he got on the ladder that is now there? Wouldn't he have to reach further and wouldn't he have to turn around in order to reach it?

A. He probably would have to turn around, but I don't think he would be farther away, not from the hand rail on this tank car. He would not be very much closer though. He probably would be four inches closer.

Q. If he did fall when he was on the end he would go down where the wheels would run over him?

A. Yes, sir.

Q. If he was on the ladder and fell straight down he would fall outside the wheels?

A. Yes, sir.

Q. But if he fell from the end ladder he would fall right close to the rail?

A. Yes, sir.

Q. Did you, yourself, make the measurement to see whether or not if a brakeman was on the end ladder on the end of a car he wouldn't be further away from the railing on the National Zinc car than he would be if he was on the ladder on the side of the refrigerator car? Did you make that measurement?

A. No, I didn't make that measurement.

400 Q. If, as a matter of fact, he would be further from the hand rail he would have, of course, to reach further, I mean by that, there is nothing else for him to catch to on the National Zinc car except the hand rails coming up there?

A. That would be all coming from a box car.

Q. One of the purposes of having a hand railing there is to have him something to catch hold of?

A. Yes, sir.

Q. But if by measurement you found you could reach it more easily from the side ladder than he could from the end ladder then what would you say as to which would be the safer?

A. I would say it would be the safer from the closest point. That would be my opinion.

Q. Would or would not it add to the safety to have the hand railing around the end of the Zinc car?

A. Well, I don't think it would, no.

Q. Why?

A. Well, because it is not the custom for one reason and brakemen are not looking for it and if you would put it on there and nobody else did, they would run into it if it was dark and liable to cause more trouble than it would be a benefit to you.

Q. Is it not also true that — went around the end that it would add something to the difficulty of getting over it when you went to go from the refrigerator car onto the Zinc car?

401 A. You couldn't put it all the way across?

Q. That is what I am speaking about.

A. No, you couldn't put it all the way across because you couldn't get from one car to another; couldn't get over it.

Q. Mr. Coleman, do you know how many of these tank cars of your company are now in service of that kind

A. Of that particular style?

Q. Yes, sir, approximately? I don't ask for the exact number, but as near as you can tell?

A. There is about sixty, from sixty to seventy.

Q. Does there exist any authority from your company to any of the railroads that transport your cars to put any hand holds or railings on the cars than your company has itself put on?

A. No, sir.

Recross-examination.

Questions by Judge FEAZEL:

Q. Suppose any of the appliances were to become defective, wouldn't the company using it, have a right to repair it as well as you would?

A. They always do, yes, sir.

Q. That is the general authority among all railroads if any appliance gets out of order in the opinion of the railroad they have a right to put it there?

A. Yes, sir.

Q. And charge it up to the original company?

A. Yes, sir.

402 Q. No, Mr. Coleman, there is one question I failed to ask you. You stated something about a stirrup being on the side of that tank car or National Zinc car, that is down next to the sill, is it not?

A. Yes, sir.

Q. Hangs downward?

A. Yes, sir.

Q. Is not out there for the use of a brakeman in passing from a high car to a low car, is it?

A. I wouldn't think they would use it for that.

Q. That is for the purpose of climbing upon the side of the tank car?

A. Yes, sir.

Q. Now you said something about there being some grab irons

on the sill of the tank car, is that near the center of the sill, perpendicular? I mean how thick is the sill?

A. It is ten inches. No, it is closer to the top.

Q. How far below the level of the floor on the tank car?

A. I judge about two or three inches.

Q. Then, when a brakeman passes from a box car to a tank car by the side ladder route he don't step on those grab irons, he steps on the platform above the-, doesn't he?

A. Yes, sir.

Q. And has got to reach over and get hold of the end of this side railing you speak of?

A. Yes, sir.

Q. How close to the side of that car is that railing? Isn't it right along the edge of the side of the car?

403 A. Yes, sir.

Q. Within an inch or an inch and a half, isn't it?

A. Well, the standard sets in on the floor probably three inches. The main floor of the car comes out over the side sill a little bit and then the standard is set in there and fastened into the side of the sill.

Q. Now that hand rail you spoke of I believe you stated was two and a half feet high?

A. Yes, sir.

Q. You stated you couldn't have them across the end because it would obstruct the passage?

A. Yes, sir.

Q. Why couldn't you set them back eighteen or twenty inches and let the brakeman step over it? A man could step over anything two and a half feet high, couldn't he?

A. He might step over it, yes, sir.

Q. You say he would be stumbling along there in the dark, don't a brakeman usually carry a lantern with them in the night? You are being examined as an expert railroad man?

A. No, sir, I am not an expert railroad man.

Q. You never tried to step from one car to another in your life while it was in motion?

A. Yes, sir.

Q. I mean the condition I am speaking of here of a box car and a tank car?

A. I don't remember to have done so.

Q. You never helped construct a car, did you?

A. No, sir.

404 Q. You just have charge of the selling and management of the business of the company who uses those cars, is that correct?

A. No, sir, I have charge of the buying of those cars. Of course I have to see that those cars conform to the specifications of the Master Car Builders' Association and the Interstate Commerce laws.

Q. You just look after the buying of the cars?

A. Yes.

Q. You have nothing to do with the selling of the products the cars carry?

A. No, sir.

Q. Nor the management of the business along that line?

A. No, sir.

Q. Are you a member of the Master Builders' Association?

A. Our company is.

Q. Did you ever attend one of the meeting-?

A. No, sir.

Q. Have you got the rules?

A. No, sir.

Q. Got them with you?

A. No, sir.

Q. Do you know of anybody got them here?

A. No, I don't know whether anybody has or not.

Q. They are printed?

A. Yes, sir.

Redirect examination.

Questions by Mr. McDONOUGH:

405 Q. Mr. Coleman, Judge Feazel asked you with reference to any railroad company or carrier repairing any defect that might exist in your car, if any car needed repairs it would be the duty of the carrier to report that defect?

A. Yes, sir.

Q. But that doesn't give the repairer of the car a right to put new handles or new railings or appliances on there you haven't got there?

A. No, sir, nothing additional.

Q. If anything is on the car as you have sent it out gets out of repair, then the company would be authorized to repair that and put it in proper shape?

A. Yes, sir.

Q. But they wouldn't have authority to put new appliances and new things on there that you yourself have not put on. Additional hand holds, for instance, or additional ladders or anything of that kind?

A. No, sir, they wouldn't take it in the first place.

Q. They cannot take it out of the yards if they didn't comply with the Interstate Commerce regulations?

Judge FEAZEL: Don't answer that.

COURT: I don't think that question is competent or the question that was asked before that.

Defendant excepted to the ruling of the Court.

Q. I will ask you if it is possible to put end ladders on those National Zinc cars.

A. No, sir, it is just like a flat car.

Witness excused.

Testimony of Joe Gutteridge.

JOE GUTTERIDGE, next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. What are your initials, Mr. Gutteridge?

A. J.

Q. Where do you live, Mr. Gutteridge?

A. Pittsburg, Kansas.

Q. What is your business?

A. Car foreman.

Q. What company?

A. Kansas City Southern Railway Company.

Q. How long have you been in the employ of that company as car foreman?

A. Since May 15th, 1910.

Q. Were you in the employ of that company before that time?

A. Yes, sir.

Q. In what capacity?

A. I was working in the car department as track man, carpenter. I was also working on the road as a fireman.

Q. Have you had any other railroad experience other than that you have described?

A. No, sir, not on the K. C. S.

Q. How long have you been in the railroad work altogether?

A. Sixteen years.

Q. Is it a part of your duties to investigate, look after and pass upon such things as ladders, hand holds and grab irons on cars?

A. Yes, sir.

407 Q. Are you familiar with the Sante Fe refrigerator cars, those in series—take for example one numbered 6239?

A. Yes, sir, that is in the outside inspection.

Q. I mean as to hand holds and grab irons and things of that kind?

A. Yes, sir.

Q. Are you familiar with the National Zinc car as to the railings and grab irons and hand holds that are on that car?

A. Yes, sir.

Q. Have you examined in the yards here at Ashdown a National Zinc car and a Sante Fe refrigerator car?

A. Yes, sir. I was looking at two down in the yards.

Q. Today?

A. Today.

Q. Mr. Gutteridge, state whether or not those cars with the hand holds and grab irons that they have, and railings, you would be authorized to refuse to receive them for transportation?

A. No, we couldn't refuse them if they were offered us for transportation.

Judge FRAZEL: That is not competent. The Court has passed on

that a dozen times. You might say by your company but so far as the law is concerned that is entirely a different question.

Mr. McDONOUGH: It isn't a question of law in my mind.

Court: You may state whether or not they would receive it.

Mr. McDONOUGH: I will change the question and ask him this:

Q. Mr. Gutteridge, are you familiar with the kinds of hand
408 holds and ladders on the cars generally throughout the
country at this time?

A. Yes, sir.

Q. Assuming that those cars were in service on July 1st, 1911 and haven't been shopped for general repairs, state whether or not those cars could be refused by the Kansas City Southern or any other company?

A. No, sir.

Court: Don't tell what they could be. Whether they would be.

Q. Whether they would be?

A. No, sir, they wouldn't be.

Q. Why not?

Court: No, I don't think that is competent. The law fixes the duties of the carrier towards its employees. You may state what they did do, but as to what they had a right to do, that is a question of law.

Mr. McDONOUGH: I accept the suggestion of the Court.

Q. Mr. Gutteridge, state whether or not in the ordinary course of business you would handle those cars in that shape or whether you would not?

A. I would handle them.

Q. What study, if any, have you given the subject of hand holds and ladders on cars?

A. I have given them deep study. I am compelled to study it in regard to the up-keep of the equipment.

Q. How many years have you been engaged in that work involving the duties of making decisions on hand holds, etc.?

409 A. Since May, 1910, and then it is my duty to see they are right, the up-keep of them.

Mr. McDONOUGH: Now, I offer to show by Mr. Gutteridge that those two cars complied with the regulations of the Interstate Commerce Commission.

Court: Describe the cars. If you want to introduce the rules of the Interstate Commerce Commission you may.

Mr. McDONOUGH: The Court excludes my offer?

Court: Yes, sir.

Mr. McDONOUGH: I save my exceptions.

Q. Mr. Gutteridge, did you, yourself, make an effort to pass from a refrigerator car here in the yards to the other car, or did you see anybody else make the effort?

A. Yes, sir, Mr. Coleman, the man that was with us, he got up and stepped across.

Q. State whether or not he could get hold of the railing on the

National Zinc car before he let loose of his hold on the ladder of the refrigerator car?

A. Yes, sir, he had hold of both at the same time, with his feet on the end sill.

Q. Did you see anybody else make the effort?

A. Yourself.

Q. State whether or not I did it?

A. Yes, sir, you got across safely.

Q. Do you know what my height is?

A. No, sir, I do not. I should judge about five feet, four.

Q. State whether or not, in your opinion, an experienced brakeman, using due care, can pass with safety down the side
410 ladder of that refrigerator car onto the National Zinc car?

A. I should say that he could.

Q. Mr. Gutteridge, I wish you would state where the railroads generally in the country place the ladders, whether on the side or ends of cars, stating, if it be true, what railroads and sections of the country place them on the end and what railroads and what sections of the country place them on the side?

A. Well, the majority, say seventy-five or eighty per cent of the western roads place them on the side. There is a few roads in the east place them on the ends of cars; that is, the B. & O. Pennsylvania.

Q. What is the reason for the difference in that custom?

A. Well, in the Eastern country they haven't the room like they have in the west. They have to go around industrial tracks in the East where factories are located. On account of being crowded for room they put them on the end so they wouldn't be raked off on the side in going in close quarters, while in the west they are put on the side of the cars because of the better location for the ladders. There is a more safe location and they have more room and don't interfere with them and they place them on the side. In case a man falls from the side ladder he would fall down on the side; if it was the end ladder he would be in a more dangerous position.

Cross-examination.

Questions propounded by Judge FEAZEL:

Q. Do you know of any reason, Mr. Gutteridge, why the
411 railroad should not use both the end — side ladder?

A. No, sir, I don't know any reason why they shouldn't.

Q. And let the brakeman use either one he thought was safest. You don't know of any answer you can make to the last one? Is it not true in making the passage from the refrigerator car that you examined down here today on to the platform of that tank car it would have been safer to the brakeman, especially if the car was running and they were lurching at the time, to have had an end ladder and side ladders?

A. No, sir, I think not.

Q. Suppose a brakeman in making this passage on the side ladder, his foot had slipped?

A. It wouldn't be so bad to slip as it would on the end ladder. In

coming down the end ladder he would have to turn around to go over. On the side ladder he has got a hand hold. If he should slip he would fall outside the rail.

Q. When he comes down the end ladder and goes to make his step to spring to light on the platform of the tank car, the foot of the rung of the end ladder would be pressing against the body of the car?

A. Yes, sir.

Q. It would be impossible for his foot to slip back?

A. It could slip sideways.

Q. But he is pressing straight back?

A. Yes, sir.

Q. How could it slip sideways?

412 A. If he was pressing straight out his foot wouldn't slip but if he happened to get to leaning one way it would slip.

Q. When he goes to make the passage from the side ladder there is nothing to keep his foot from slipping back?

A. The end of the grab iron.

Q. Which end?

A. Both ends are alike on the grab iron. They turn up. They had a two inch projection, the foot would strike that and then go over on the tank car.

Q. Suppose this — be a refrigerator car, the side ladder is down here?

A. Yes, sir.

Q. Right near the end. They are put on horizontally with the car? Now he has got to make his passage from that side ladder to the platform in front of him?

A. Yes, sir.

Q. The pressure of the spring is all horizontal with that ladder?

A. Yes, sir.

Q. The thing you are talking about is back here on that far end?

A. It is the far end grab iron from the end of the car.

Q. How long are those grab irons?

A. Sixteen inches.

Q. Then, that would put him sixteen inches from the closest point of the grab iron to the platform of the tank car?

A. It would put his foot sixteen inches back; then it would be if it was on this side or eight inches further than the normal

413 condition.

Q. That you tell the jury, in your opinion in making a passage of that kind it is safer to make it from the end grab iron than the side grab iron?

A. Yes, sir.

Q. You mean to tell them it is not safer?

A. No, it is safer to go from the side grab iron than it would be from the end. That is my opinion.

Q. How much experience have you had as a brakeman?

A. I never worked as a brakeman.

Q. Did you ever try to make that passage before today?

A. Yes, sir.

Q. When and where?

A. Numerous occasions I was on the road I had occasion to climb on the cars; also at the present time the switchmen bring in a train of cars and I go from one to the other.

Q. Do you recall any particular instance where you attempted to pass from a refrigerator car onto the platform of a tank car?

A. No, sir.

Q. You never tried that that you know of?

A. I might have done it but I don't remember it.

Q. Have you ever worked for any other railroad company than the Kansas City Southern?

A. No, sir.

Q. You began with them as a fireman?

A. No, sir, I began in the round house.

414 Q. The fireman's place is in the cab?

A. Yes, sir.

Q. Did I ask you a moment ago how much it would cost to put both side and end grab irons on these box cars?

A. Yes, sir.

Q. What was your answer?

A. I didn't answer it?

Q. Give us your opinion now as to what it would cost to put on both, end and side grab irons or ladders?

A. I would say ten dollars a car on the estimate. Now, I am giving this estimate on our equipments.

Q. That is substantially correct in your judgment?

A. Yes, sir. What I mean to get at, a refrigerator car if you had to take the inside out it would be possible more?

Q. Suppose that refrigerator car already had one grab iron down within eighteen or sixteen inches in the—that has got some timbers already fastened to?

A. Yes.

Q. That is fastened to the apparatus between the two sills, is it not?

A. Yes, sir.

Q. Then, why couldn't you put one above that, say, the height of a man's shoulder to hold to?

A. It would be out of place.

Q. Why?

A. If you have a ladder there the law at present——

Q. I know the law myself——

A. Well, you couldn't put anything on there against the law.

415 Q. What about the construction of that car? Is there anything about the construction of that car to keep you from putting — another grab iron?

A. No more than it would be against the law.

Court: You haven't anything to do with the law.

A. Well, we have if we are building cars.

Q. I ask you if there was anything in the construction of that car to prevent that?

A. I don't understand it.

Court: Tell how the cars can be put.

Q. You are experienced in the construction of cars. What is that lower grab iron fastened to?

A. It is fastened to what we call a——

Q. What is to prevent you from putting them very near the top?

A. Nothing to prevent it.

Q. What would prevent you from putting it there any time?

A. Because it is against the law to run it in that condition.

Q. Is that the only thing you know of that would prevent it?

A. Because it is against the law.

Q. How long would it take a man to put an extra grab iron there?

A. It would take a man a half day to — it in there right.

Witness excused.

416

Testimony of J. H. Burk.

J. H. BURK, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Burk, where do you live?

A. Heavener, Oklahoma.

Q. Are you in the employ of the Kansas City Southern Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Local Agent, Heavener, Oklahoma.

Q. How long have you been in the employ of the company?

A. Ten years.

Q. Were you in Heavener on the night of March 24th, 1913, when the train was brought in from which it was reported that Leslie Old fell?

A. I was.

Q. Were you present when the examination was made of refrigerator car 2369, the one being next to the National Zinc Car and the National Zinc Car?

A. Yes, sir.

Q. State whether or not you and Mr. Monroe and Mr. Black made any examination of the wheels of these cars to see whether or not any blood could be found there?

A. We did.

Q. Could you find any?

A. None at all.

Cross-examination.

Questions by Judge FRAZEL:

Q. He is reported to have been killed at Page?

417

A. Yes.

Q. How far is Page from Heavener?

A. Seventeen miles.

Q. The train supposed to have killed him came to Page from Heavener before you made the examination?

A. Yes, sir.

Q. Isn't it true if there had been any blood on there before it ran that distance it would likely have been worn off?

A. I can't say as to that.

Witness excused.

418 *Testimony of L. S. Monroe.*

L. S. MONROE, the next witness called on behalf of the Defendant, having been previously sworn, testified further in response to questions by Mr. McDonough:

Q. Mr. Monroe, in leaving Page that night, if I understand you you got on the caboose at a point where the caboose was standing south of the depot?

A. Yes, sir.

Q. Did you get on immediately when the caboose started or after it had gone a little distance?

A. I got on just as it started.

Q. State whether or not there was, in that train, in leaving Page any unusual or great force? Did you notice any unusual swaying of the train?

A. No, sirm I did not; nothing unusual.

Q. Was there any unusual movements of the train of any kind in leaving the station there?

A. Not that I noticed there wasn't, no, sir.

Q. Do you remember who was the engineer?

A. Yes, sir.

Q. Who.

A. T. J. Clayton.

Q. Were you out on top of the caboose or in the caboose as the train pulled out?

A. I got on top of the caboose until conductor Eames got on. Then I went inside.

Q. You stayed on top of the caboose then about how far?

A. I should judge the caboose moved eight or ten car lengths, about that, when Eames got on.

419 Q. Did that take you north of the station before you went in the caboose?

A. Just about opposite the station?

Q. Did you, or did you not, at any time after you got on the caboose see any light on the train between you and the middle of the train?

A. After I got on the caboose?

Q. After you got on the caboose?

A. Yes, I did.

Q. You do not know who that was?

A. No, sir, I do not.

Q. Do you know where the head brakeman got on?

A. No, sir, I do not.

Q. Did you see his light on the train?

A. No, sir.

Q. Did you see any light about the middle there?

A. No, sir.

Q. You saw one light up ahead of you?

A. Yes, sir.

Q. And only one?

A. Only one.

Q. Was that light still there when you went into the caboose?

A. Yes, sir.

Q. Did you look forward any more soon after that?

A. It was some little time because I read orders after I went in the caboose.

Q. About how far were you north of the station when you looked forward again?

A. I should judge it was about a mile.

420 Q. Do you know the length of that train from the caboose to the engine taking the cars as they were there?

A. You mean in feet?

Q. Yes.

A. No, sir, I do not.

Q. Was there any trouble with the air of that train in moving out from Page?

A. No, sir.

Q. You had previously set out a car before going to Page on which there was some trouble, had you?

A. I couldn't say that was the car we had the trouble with or not.

Q. But you had no trouble in moving out of Page with your air?

A. No, sir.

Q. Do you know how many empties were in that train and how many loads?

A. No, sir, I couldn't say.

Q. Approximately were there not about half empties and about half loads?

A. It seems to me there were more empties than loads but I wouldn't be positive.

Q. Is it true, or is it not true, or what is the facts as to the movement of a train, say, if they had more empties is that easier to move out gradually than a full loaded train, a train in which they are all loads? Have you had enough experience to tell as to that? Did you ever act as an engineer?

A. No, sir, I never did.

Q. Well, then, I will not ask the question if you are not familiar with it. Mr. Monroe, I want to understand you about what you said about the light. If I understand you you went in the caboose about the time you were opposite the depot?

A. Yes, sir.

Q. And at the time you started in the caboose this light that you spoke of was still ahead of you?

A. Yes, sir.

Q. On the train?

A. Yes, sir.

Q. That was how far ahead of the caboose?

A. As near as I could judge it looked to me to be about ten or twelve car lengths.

Q. Those cars counting the space between the cars and the length of the car averaged about forty feet to the car, do they not?

A. We had some short cars in the train, I think about thirty-eight feet; probably a little more, I wouldn't be sure; probably about that.

Q. Was it your statement the other day, that when you first saw that light that it was about twelve cars ahead of you, or did you say more than that?

A. I should judge it was about twelve.

Q. That is what you testified to the other day?

A. Yes, sir.

Q. Is that your recollection that it was about twelve cars when you first noticed it?

A. Yes, sir.

Q. And about the same when you went in the caboose so far
422 as you could tell?

A. Yes, sir.

Q. You last saw it when you were about opposite the depot?

A. Just about opposite the depot, yes, sir.

Q. The caboose is about what length? about thirty-five feet?

A. Something about that, yes, sir.

Cross-examination.

Questions by Judge FEAZEL:

Q. You don't pretend, Mr. Monroe, to tell the jury that that light you saw was just twelve car lengths from the caboose? You are just guessing that?

A. I am only judging that; that is all.

Q. Whatever became of that light?

A. I don't know.

Q. You never saw it any more?

A. No, sir.

Q. Was it moving? I mean, was the person holding the light moving or standing?

A. Apparently he was standing.

Q. That light was where Old ought to have been, was it?

Mr. McDONOUGH: That is objected to.

Q. Well, in the discharge of his duties that was his part of the train?

A. Yes, sir.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. That was about the rear end of his part of the train,
423 wasn't it?

A. Yes, sir.

Q. If the train had fifty cars in it his part would be about seven-
teen cars out about the center?

A. Well, very often the kind of a train we have is that we have
to measure ourselves by.

Q. If he had a third of a train out of the center that would leave
seventeen cars in front of the caboose which would not be his?

A. Yes, sir, a third of the train.

Q. Those would be between the caboose and where he should set
in; then if he was within twelve cars of the caboose he would be
behind where he ought really to be?

A. Well, the swing man's position depends greatly on the location
of the cars in the train.

Q. But upon the assumption I have stated he ought to be more
than twelve cars ahead of the caboose?

A. A third of the train would throw him farther ahead, yes, sir.

Q. If he is swing brakeman and wants to get onto his part of
the train he could get on as the train passed by at any part of his
section he wanted to get on, couldn't he?

A. Yes, sir.

Recross-examination.

Questions by Judge FEAZEL:

Q. He could get on anywhere on the train he wanted to, couldn't
he?

A. Yes, sir.

424 Q. Now then, you state there was quite a number of empty
cars in that train? Where were those empties?

A. They were mixed all through the train.

Q. There was no loaded cars in the rear, were there?

A. I couldn't say as to that.

Q. Didn't you testify the other day the loads were all in front of
where you saw that light?

A. No, sir.

Q. Do you know whether there was any loaded cars behind where
he got on the train?

A. I don't think there was. I couldn't be positive.

Q. He don't do any work except so far as the retainers is con-
cerned?

A. In order to get eight-five per cent air brakes we might possibly
use empties.

Q. But as a general rule you use loaded cars where you can get
eight-five per cent?

A. Yes, sir.

Witness excused.

425

Testimony of Harry Eames.

HARRY EAMES, having previously been sworn, is called by the defendant, and testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Eames, what was your statement when you were on the stand before as to how far ahead of the caboose it was that you observed the light upon the train or in the act of getting upon the train?

A. About the 13th or 14th car.

Q. Didn't you say the 16th or 17th car?

A. No, I said that that National Zinc car was about the 16th or 17th car.

Q. And this light then was on the 13th or 14th car ahead of the caboose?

A. Yes, sir.

Q. Now, when did you last observe that light?

A. As it passed me. It was going north and I was standing still.

Q. Didn't look at it as you were going in the caboose?

A. No, sir.

Q. There wasn't but one light up there?

A. That is all that I saw except the rear one on the cupola.

Q. I know, but at the point where this 13th or 14th car we are speaking of?

A. Yes, sir.

Q. One light there that you observed?

A. Yes, sir.

Q. I wish you would state again the average length of those cars, taking into consideration the length of the car and the space between the cars?

426 A. Well, the cars run from thirty-two to forty feet in length.

Q. How much space is between?

A. Well, there is about eighteen inches to two feet.

Q. Could you give an estimate of the average space that would be occupied by those cars in that train. Would it be as much as forty feet including the space between the car- on an average to the car itself?

A. Well, it would be something in that neighborhood, yes, sir.

Q. I will show you a list and ask you if that is your original wheel report in that train and the cars that were in them?

A. Yes, sir.

Q. Mr. Eames, does this wheel report show the order in which those cars appear in the train?

A. Yes, sir.

Q. What car was next to the engine?

A. The engine?

Q. Look and see?

A. C. B. & Q., 10766.

Q. What car was next to the caboose?

A. M. V. T. E. 805.

Q. What number of the car was the National Zinc car number seventeen from the caboose?

A. Number seventeen.

Q. That did not count the caboose?

A. No, sir.

Q. It would be eighteen if you counted the caboose?

A. Yes, sir.

427 Q. Would it be the eighteenth car in the train counting the caboose as first?

A. Yes, sir; but we never count that.

Q. I wish you would examine that wheel report and see how many empty cars there were in that train?

A. There are seventeen right ahead of the caboose.

Judge FEAZEL: Seventeen empties.

A. Yes, sir, immediately ahead of the caboose and twenty-five is the total. There is six over here in another space 36th to 42nd inclusive, that is counting the head of the caboose and the 37th and 42nd inclusive were empties to the 48th car.

Q. How many loads did you have when you were pulling out of Page?

A. Twenty-four.

Q. What was the tonnage?

A. It takes sometime to figure that out.

Q. I will ask you to figure it up later but not now. After you leave the witness stand you can figure it up and I will recall you. State whether or not as your train moved out of Page there was any unusual or violent jerking of the train?

A. No, sir.

Q. State whether or not as you were moving out there was any trouble with your air brakes?

A. No, sir.

Mr. McDONOUGH: I want to introduce that (pertaining to 428 wheel report) but I want to substitute a copy.

Judge FEAZEL: We won't have any trouble about that.

The wheel report is here introduced and marked Exhibit A to the testimony of Harry Eames, and attached hereto.

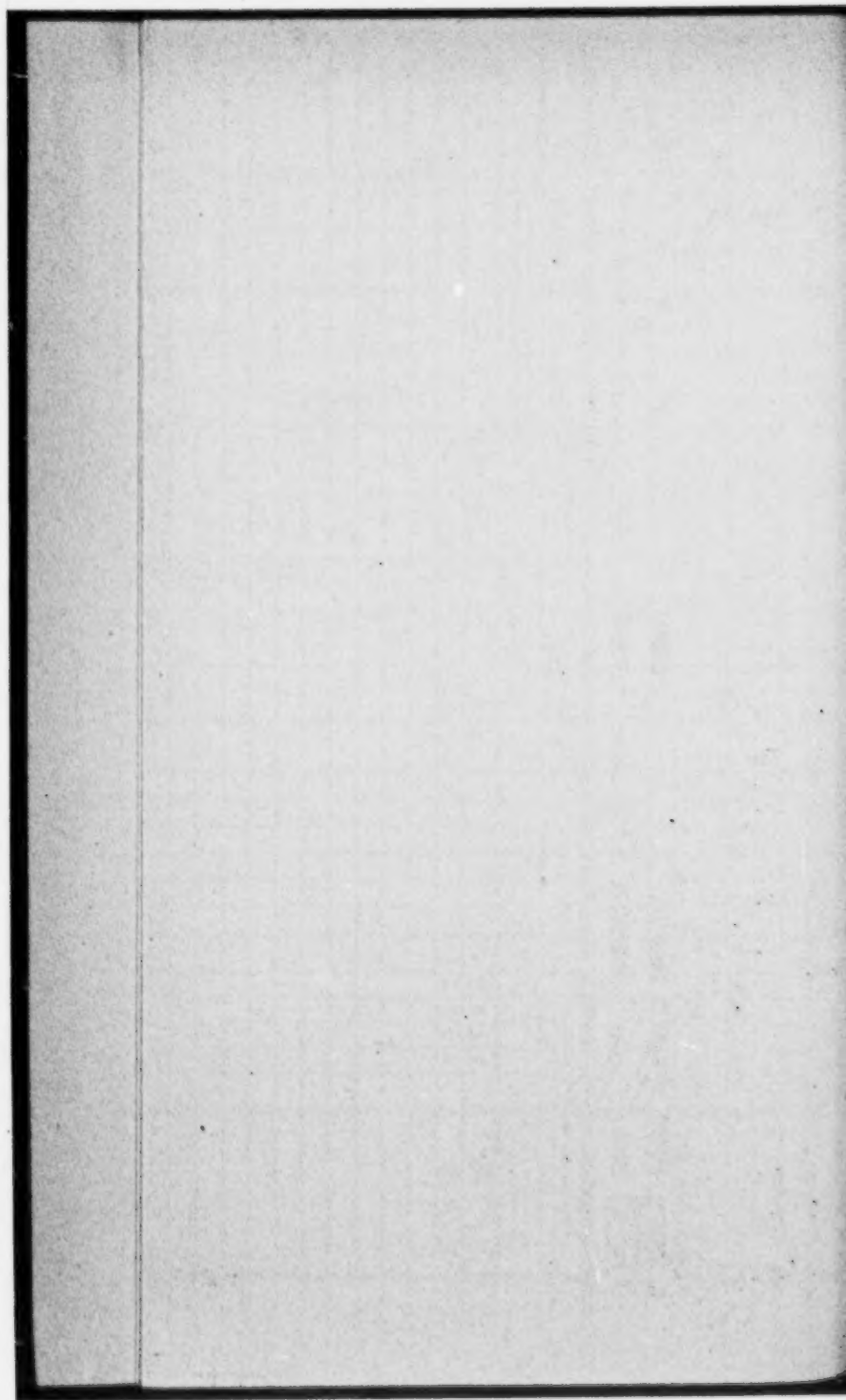
(Here follows conductor's wheel reports, marked pages 429 and 430.)

REPORT OF CARS IN TRAIN NO. LEAVING AT M 191
 ENGINE 704 CONDUCTOR Carver ARRIVING 3.38 AT 10:15 PM 3-24 1912

PORT
ARTHUR
ROUTE

KIND	ALL CARS EXCEPT AT RIGHT				K. O. & B. NUMBERS	KIND OF BILLING	WEIGHT IN TONS	MOVEMENTS		CONTENTS	MILEAGE		DESTINATION
	INITIALS	NUMBERS						FROM	TO		LOADED	EMPTY	
Coal					534		CAR	TRUCK	434	338	X FOR EMPTY		
28	M. H. S.	8051					20		1	—	X		317
"	M. P. Q.	783					20		2	—	X		—
6	O. S. E.	41717					22		3	—	X		—
6	B. T. Q.	149176			0712		20		4	—	X		201
8m					22970		24		5	—	X		201
"					22972		18		6	—	X		—
"					22740		18		7	—	X		—
6	Wat	22567					20		8	—	X		—
6	M. P. S.	6597					20		9	—	X		78
"	S. P. C.	4864					20		10	—	X		0
"	S. P. R. D.	2392					20		11	—	X		—
"	A. R. S.	43467					20		12	—	X		—
"	S. T. M.	56623					20		13	—	X		—
"	S. T. R. D.	7498					25		14	—	X		—
"	—	6239					20		15	—	X		333
28	M. Q. L.	17					20		16	—	X		—
13	M. P. S. O.	88982					20		17	—	X		0
"	M. P. R. Q.	39107					20	21	18	—	Stk		—
"	M. P. S. O.	31843					20	31	19	—	—		—
"	—	49663					20	35	20	—	—		—
"	—	24422					16	28	21	—	—		—
"	L. B. R. Q.	102845					17	25	22	—	—		—
"	S. A. S.	20003					18	23	23	—	—		—
"	L. P. R. S. M.	13324					19	20	24	—	—		—
"	L. S. L.	22014					18	30	25	—	—		—
"	P. M.	31951					16	21	26	—	—		—
6	P. S. L.	42647					23	35	27	—	—		—
"	B. T. Q.	146373					24	27	28	—	—		—
"	S. T. R. D.	139418					31	39	29	—	—		—
"	M. S. L.	44173					16	26	30	—	—		—
"	P. S. E.	41425					22	42	31	—	—		—
"	P. R. R.	231021					22	31	32	—	—		—
B.	L. M. S. P.	202958			14900		19	28	34	—	—		13/0
"	L. T. M. T.	7638					20	22	35	—	—		—
M.	P. M. R.	9387			22964		19	24	36	—	—		201
6	P. M. K. Y.	29004					18		37	—	X		0
"	S. T. R. D.	140046					18		38	—	X		—
"	S. T. M.	67298					17		39	—	X		—
"	B. T. Q.	148539					23		40	—	X		—
B.	S. T. S. M.	44086					19	23	41	—	X		174
6	M. T.	1750					16		42	—	X		317
B.	S. L.	23112					19	28	43	—	X		0
"	S. T. S.	4592					15	15	44	—	Stk		0
"	B. T. Q.	146985					24	26	45	—	"		0
6	M. T.	934					16		46	—	"		—
"	L. T. S.	184404					21	28	47	—	X		317
B.	L. R. S. O.	51265					15	20	48	—	Stk		0

B-Box. S-Stock. Q-Coal. F-Flat. Fm-Furniture. R-Refrigerator. T-Tank. M-Maintenance of Way.



431 Cross-examination.

Questions by Judge FEAZEL:

Q. The seventeen rear cars you state were empties?

A. Yes, sir.

Witness excused.

432 *Testimony of T. J. Clayton.*

T. J. CLAYTON, the next witness called on behalf of the defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Clayton, where do you live

A. De Queen, Arkansas.

Q. What is your business?

A. Locomotive engineer.

Q. In the employ of what company?

A. Kansas City Southern.

Q. How long have you been in the employ of that company?

A. Seventeen years.

Q. Were you locomotive engineer on train, extra train 704 March 24th, 1913, being the train off of which Leslie, or on which Leslie Old is said to have been injured?

A. Yes, sir.

Q. Did you act as engineer on that train from the time it left De Queen?

A. Yes, sir.

Q. Were you on the train at Mena as engineer?

A. Yes, sir.

Q. About how long did your train stop at Mena?

A. Between thirty and thirty-five minutes I think.

Q. Did you take any lunch there?

A. Yes, sir.

Q. Did you see Leslie Old while you were there?

A. I saw Mr. Old at the water tank while we were there taking water.

Q. At Mena?

A. Yes, sir.

433 Q. Did he go to lunch where you went to lunch?

A. No, sir, he didn't eat at the same place where I did. He started down town I suppose to lunch.

Q. Did you all eat together?

A. Sometimes we do and sometimes we don't.

Q. You didn't eat together that day?

A. No, sir.

Q. Were there saloons in Mena at that time?

A. Yes, sir.

Q. Do you know whether or not he was drinking any of your own knowledge? Did you see him any more after you left Mena?

A. I saw him at Howard.

Q. Did you see him at Page?

A. No, sir.

Q. About how long did that train stand at Page?

A. Between eight and ten minutes; maybe a little longer.

Q. Describe what signal you got on which you left Page?

A. I received what we call the high ball; that is, the proceed signal from two lanterns on the platform of the depot.

Q. Those two lanterns were on the platform at the time?

A. Yes, sir.

Q. At the station at Page?

A. Yes, sir.

Q. The station there is on the east side?

A. Yes, sir.

Q. Your side was on the right hand side going north?

A. Yes, sir.

434 Q. That puts you on the same side that the station is on?

A. Yes, sir.

Q. And that is on the same side these signals were on?

A. Yes, sir.

Q. Did you receive any other signals to go ahead?

A. After the train was started and the caboose came in sight I received another signal which signified to me that all the cars were coming.

Q. Where was that signal from?

A. The rear of the train, from about the caboose. I judge it to be about caboose.

Q. Did you receive any signal from any lantern on top of the train and about the middle of it or near the middle of it?

A. No, sir.

Q. Did you see any lantern on top of the train as you moved out of Page, near the middle of the train?

A. No, sir.

Q. Describe how you moved your train out of Page?

A. Page is a place, where, when going north, it is a little down hill, and we had a long train and a large engine, which requires extra precaution in starting the train to avoid bumping the draw bars, and in order to start the train without bumping the cars we have to start slow and take out the slack gradually, but the engine at the time had a small amount of steam in the cylinders and I just released the independent air brake on the engine and the weight of the engine, together with the small amount of steam in the cylinders, was sufficient to start the head end of the
435 train, and there was no steam used to pull the train as the weight of the engine starting and the descending grade caused the whole thing to start without using steam.

Q. Now, when you did use the steam, describe the manner in which you use the steam?

A. By opening the throttle very lightly at first and taking the slack out of the cars gradually. It requires considerable time to start one of those trains with a Mallet type locomotive.

Q. About how far, in your judgment, had you travelled before you began using steam?

A. Between a quarter and a half mile.

Q. State whether or not up to that point there were any unusual or violent jerks in your engine or train?

A. There was not.

Q. State whether or not in pulling your train out of Page there was any defect in your brake appliances?

A. There was none.

Q. When you began using steam between a quarter and a half a mile north you say you applied the steam gradually?

A. Yes, sir.

Q. Did you make any violent jerks at that time?

A. No, sir.

Q. When did you first have information of the injury that Mr. Old had received?

A. After my arrival at the round house. You might add that the conductor called me up over the telephone and notified me at the dispatch office.

Q. That is, conductor Eames?

A. Yes, sir.

Q. Who was your fireman, Mr. Clayton?

A. T. F. Anderson.

Q. He was with you as you left Page, was he?

A. Yes, sir.

Q. What is the distance from Mena to Page?

A. Between twenty-five and twenty-six miles.

Q. What is the distance between Rich Mountain and Page?

A. Between twelve and thirteen miles.

Q. And from Page to Heavener is how far?

A. Seventeen miles.

Cross-examination.

Questions by Judge FEAZEL:

Q. You say when you left the water tank at Mena you didn't see Old any more until you got to Howard?

A. No, sir.

Q. How far is that from Mena?

A. Sixteen or seventeen miles.

Q. How come you to see him there?

A. Making the stop at Howard we had trouble with the draw bars, and the knuckle upon it bent so we couldn't remove it. The head brakeman and fireman and myself were working between the tank and the engine on the first car on this when Mr. Old came up. We were acting on short time to get into the clear for number seven.

Q. What is number seven?

A. That is a Passenger train going south.

Q. Al-right?

A. I instructed Mr. Old to get the red light, go out and flag number seven?

Q. Tell the jury how that is done?

A. A man sent out to flag proceeds a sufficient distance between the approaching train usually a quarter of a mile, sometimes a half a mile with a red light and a white light with an additional precaution signal of a fusee.

Q. What is a fusee?

A. It is a signal like a Roman candle with a cap at the end of it, which by striking on metal substance or by scratching it like you would on a match or cap, starts to burn. It makes a red light like these Roman candles will make and will burn five or ten minutes. It has a sharp point so it can be stuck in a tie.

Q. How close was he to you when you sent him out immediately before that?

A. He was in six feet of me.

Q. You observed his ways, did you?

A. Yes, sir.

Q. Did you observe or notice anything about him to indicate that he was drinking?

A. No, sir.

Q. If he was drinking there was nothing in his appearance to indicate it to you at all?

A. None whatever.

438 Q. You say that was six or seven miles this side of Page? You never saw him any more until when you say?

A. I never saw him since.

Q. Now, didn't you have some kind of a dynamiter in that train along that evening?

A. Not there.

Q. Where did you have it?

A. At Rich Mountain.

Q. Did you correct it at Rich Mountain?

A. It was corrected, yes.

Q. How did you correct it?

A. By setting the car out at Howard.

Q. Who was your end brakeman next to you?

A. Smith.

Q. Didn't you tell him between Rich Mountain and Page you believed there was a dynamiter and you had been looking for it but couldn't find it?

A. I didn't tell him I had been looking for it because it isn't the engineer's duty to look for it.

Q. "We had been looking for it?" Didn't you use language like that?

A. No, I told him in pulling the train out at Rich Mountain it is necessary to stop after we pulled out to a side track it was necessary to stop the train so that the rear brakeman could shut the switch. In making the application to make this stop the car went on in emergency because knuckle break on the car between the engine and the first car.

Q. Now, is that the one you set out?

439 A. That is the one we set out at Howard.

Q. How far did you go with that broke knuckle?

A. We chained the car up at Rich Mountain and went to Howard.

Q. The knuckle is what part of the car?

A. The knuckle part of the draw bar. The knuckle was broken and we used a chain to couple the car and engine together instead of this knuckle, and when we arrived at Howard we intended to set this car out, but the knuckle pin that held the chain had bent in the knuckle in such a way that we couldn't get it out.

Q. You carried it on then to where?

A. We set it out at Howard.

Q. You met the passenger train at Howard too?

A. Yes, sir.

Q. Had you set this car out before you met the passenger train there before Old went out to flag it?

A. No, he went out to flag while we were setting this car out.

Q. You put it on the side track? That is what you did to it?

A. Yes, sir.

Q. How did you get out of the way of the passenger train?

A. There is a spur track there that holds about ten cars, and we put this car in on the spur track, then we took the passing track?

Q. Suppose there had been a severe jolting and lurching of that train as it went out of Page what could have caused it?

Mr. McDONOUGH: The law, as I understand it, doesn't warrant a supposition of that kind where that is an issue to be established.

Court: He relies on the statement of some of the witnesses.

Mr. McDONOUGH: Then it would be wholly inadmissible because it would be a question for the jury.

Court: The better way would be to ask by what causes may usually—

Defendant excepted to the ruling of the court.

Q. Well, what usually causes a severe jerking and lurching of the train?

Mr. McDONOUGH: That is objected to for the reason it is incompetent, immaterial and irrelevant.

Court: I think that is competent.

Defendant at the time excepted to the ruling of the Court and asked that its exceptions be noted of record, which is done.

Q. Give us the benefit of your judgment as to the cause of these things? From your experience as an engineer give us your best judgment on it?

A. I couldn't answer that question. I would have to know what conditions.

Q. Now then, assuming the train did lurch and jerk unusually that night as it was going out of Page, what, in your opinion, would have caused it.

Mr. McDONOUGH: Object to that.

Court: Objection overruled.

Defendant excepted to the ruling of the Court and asked that its exceptions be noted of record, which is done.

A. It could have only been caused by the engineer in charge using too much steam and starting the head end of the train too quickly.

441 Redirect examination.

Questions by Mr. McDONOUGH:

Q. That did not occur? You didn't do that with your engine?

A. No, sir, there was no jolt there.

Witness excused.

442

Testimony of Harry Eames.

HARRY EAMES, having previously been sworn, is recalled by the defendant and testified further as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Eames, state whether or not it is proper or improper for an employee, such as a brakeman on the Kansas City Southern at that time, to be drinking while on duty.

A. No, sir.

Q. I asked you the question whether or not it was proper or improper?

A. It is improper.

Q. Is it against the rules for him to do —?

A. Yes, sir.

Judge FEAZEL: That is all incompetent if the Court please.

COURT: I think that is competent.

Plaintiff excepted to the ruling of the Court.

Cross-examination.

Questions by Judge FEAZEL:

Q. When you are acting as conductor and you find a man in your service drinking, what do you do with him?

A. Leave him off the train.

Q. You saw Leslie Old that day?

A. Yes, sir.

Q. You were thrown with him a good deal that afternoon, were you?

A. Well, he wasn't in the caboose very much; that is, just before the accident.

Q. You saw him at Page?

A. Yes, sir.

443 Q. He and you talked through the same window to the agent?

A. We were about like the stenographer and I are. About three or four feet I guess.

Q. Did you smell any whiskey on him?

A. No, sir.

Q. Did you see anything about his conduct, movement or words to indicate he was drinking?

A. No, sir.

Q. You made a report of that fact to the railroad when you got to Heavener you thought he wasn't drunk?

A. Yes, sir.

Q. Told him if he was you didn't know it?

A. Yes, sir.

Redirect examination.

Questions by Judge FRAZEL:

Q. Mr. Eames, did you notice the quarrelsome language or loud language between agent Tucker and Leslie Old?

A. I couldn't say it was quarrelsome. I was busy with my orders and they were talking.

Q. Your attention was on what?

A. On my train orders.

Q. Did you reprimand them in any way?

A. Yes, sir.

Q. For what?

A. For talking while I was getting my orders.

Q. You were not examining Old to see whether or not he was drinking at the time?

A. No, sir; I had no reason to think he had been drinking.

444 Q. Didn't make any effort to determine whether he had been drinking or not?

A. No, sir.

Q. And your attention was strictly on getting your orders?

A. Yes, sir.

Q. Have you figured up the amount of tonnage?

A. I have.

Q. What was the tonnage you had?

A. 1863.

Recross-examination.

Questions by Judge FRAZEL:

Q. If he and the agent had a fuss there that night in which they cursed each other you don't recollect it?

A. If they cursed each other I don't recollect that.

Q. If there was anything between them to indicate they were mad, you didn't know it?

A. No, sir.

Q. How long after you left the station before Old came out and passed you?

A. I couldn't say just how long it was. It couldn't have been but a minute or so.

Q. In just a very short time he followed right along behind you and passed you going south?

A. Yes, sir.

Q. Then the reprimand you gave these boys was not on account of a quarrel between them but the noise disturbed you? Is that the way I understand you?

A. Yes, the orders were affecting the movement of my train and there were some of them lying in the window and there was one order affecting the movement of my train I would immediately have to protect it and I told the agent I says, "tell him I am going to run 55 through the side track." That was the order to see if there was a train coming that would prevent me from putting 55 through the side track, and he says "I got another order for you."

Q. Who said that?

A. The agent, Tucker. Then as I reprimanded him about making a noise there I asked him, I says: "why don't you give me all the orders at first?"

Q. It is a very common thing for railroad employees to jower at each other along the line, is it not?

Mr. McDONOUGH: That is objected to as being incompetent, irrelevant and immaterial.

COURT: Yes, I think it is. You have introduced this proof as tending to show evidence of drunkenness and I think it is competent.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. Isn't it a very common thing for brakemen to josh as they pass along?

A. That depends a good deal on their nature. There is some instances it is and some never has anything hardly to say.

Q. That occurs at more places than Page?

A. Yes, sir.

446 Q. And on more occasions than at Page?

A. Yes, sir.

Witness excluded.

447

Testimony of T. J. Clayton.

T. J. CLAYTON, recalled, having previously been sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Clayton, state what was the capacity of your engine, I mean by that what amount of tonnage would it haul?

A. They hauled 1,950 tons on a one and a half per cent grade and 2,050 tons on a 135 per cent grade and they handled 10,480 tons on the level.

Witness excused.

448

Testimony of T. F. Anderson.

T. F. ANDERSON, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Anderson, what is your business?

A. Fireman.

Q. On what road?

A. K. C. S.

Q. How long have you been in the employ of that company?

A. Four years and six months.

Q. Were you the fireman that was on the train with Mr. Clayton as engineer on the night Leslie Old was killed?

A. Yes, sir.

Q. Where were you when you first heard of it?

A. Heavenr.

Q. Were you on the train as you pulled into Page?

A. Yes, sir.

Q. Were you on the train as you pulled out of Page?

A. Yes, sir.

Q. About how long did you stop at Page?

A. Oh, I suppose seven or eight minutes.

Q. Describe the method of leaving when you got ready to leave; how you went out; in what manner.

A. Well, we just started as usual.

Q. State whether or not there was any unusual jerks or jolts?

A. No, sir.

Q. Which side of the train were you on?

A. The left side.

449 Q. That was on the side opposite the depot?

A. Yes, sir.

Q. Did you receive or take any signals from anybody?

A. No, sir.

Q. Was it a coal burning engine or oil burner?

A. Oil burner.

Q. Was there any trouble with any of your air brakes in going out of Page that night?

A. No, sir.

Witness excused.

450

Testimony of R. W. Smith

R. W. SMITH, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Smith, you are not well today?

A. No, sir.

Q. Mr. Smith, you were sworn and examined to some extent the other day in this case?

A. I was sworn.

Q. But not examined?

A. No, sir.

Q. Were you brakeman on that train that night?

A. Yes, sir.

Q. On what part of the train were you?

A. On the head end.

Q. Occupying the position as head brakeman?

A. Yes, sir.

Q. Did you go down to the station when the train stopped at the station?

A. Yes, sir.

Q. How long did you stay there?

A. I stayed there until my orders were ready.

Q. Hear any conversation there between Brakeman Old and the agent Tucker?

A. I heard a conversation, yes, sir.

Q. Was there any quarrel between them?

A. If there was I couldn't say. I don't remember them quarreling because I was bent on getting orders myself, and I didn't pay much attention.

Q. Did you go away before Brakeman Old went away?

451 A. Yes, sir; I was the first one went out of the door.

Q. Where did you get on the train?

A. I went and got on the train—I went and got on the engine and handed the engineer the orders.

Q. You took the orders to the engineer?

A. Yes, sir.

Q. Did you receive any signals from anybody toward the rear of the train?

A. No, sir.

Q. Did you see any signals given from the platform at the station?

A. No, sir.

Q. Did you see any signals given from anybody toward the rear of the train?

A. No, sir.

Q. Was any signals given from the middle of the train?

A. No, sir.

Q. Where do your duties call you?

A. They call me on the head end of the train coming up to the retainers at that time.

Q. When you gave the orders to the engineer, what did you then do?

A. I got down off the engine and caught a car and started to my duty at that time.

Q. How far from the engine did you get on a car?

A. I got on the first car from the engine.

Q. Have a lantern with you?

A. Yes, sir.

452 Q. State whether or not as that train pulled out there were any violent or unusual jerks or movements of the train?

A. No, sir; not that I knew of.

Q. Did you observe any of any kind?

A. No, sir; not at that time.

Q. Did you have any trouble with your air in moving out of Page that night?

A. Not out of Page, no, sir.

Q. After you got your orders did you give the engineer a signal?

A. I told him to go ahead. When I got right close to him I told him to go ahead. I says "they are all ready back there, I think." I gave him a signal with the lantern.

Q. That was before you got on the train?

A. Yes, sir.

Cross-examination.

Questions by Judge FEAZEL:

Q. When was it the engineer told you about the dynamiter he was looking for and couldn't find?

A. It was coming down Rich Mountain I believe.

Q. That was after you left Rich Mountain he told you he had been looking for it and didn't find it?

A. Yes, sir.

Q. Now then, who got in the depot first when you got to Page?

A. I was the first man in the depot.

Q. How did you go in?

A. I stood by the side of the train I got off the engine
453 just as it rolled into the station.

Q. And went into the depot?

A. No, sir; I didn't go in at that time. I stopped there on the platform to look at the train pass by to see if anything was broke and then I got in and went in the depot.

Q. Who came next of the train crew into the depot?

A. I couldn't say, I don't remember.

Q. If there was any quarreling between the agent and Old you didn't hear it?

A. No, sir.

Q. Did you see Mr. Old any more?

A. Yes, sir; he was in there.

Q. Had you seen him before that during the afternoon?

A. Yes, sir.

Q. Was there anything in his conduct or ways or words or on his breath to indicate he was drunk?

A. Nothing that I know of.

Q. How far above the depot was the engine when it stopped?

A. I presume from twenty-five to thirty car lengths.

Q. A car is generally about forty feet long, is it not?

A. It would average from thirty-four to forty.

Q. Does that include the space between them?

A. No, that would be about——

Q. After you got your orders you walked up the track to near the engine?

A. Yes, sir.

Q. And you gave the signal to pull out?

A. I gave them the signal to pull out.

454 Q. Now, what car did you get on when you got up there?

A. I think it was the box car next to the engine.

Q. You got on the car next to the engine?

A. Yes, sir.

Q. And began to do what?

A. Turning up the retainers.

Q. How far back did you go?

A. I don't know. From seventeen to eighteen cars I think.

Q. Before you quit turning them up?

A. Yes, sir.

Q. You knew you had to put the retainers up just ahead of you?

A. Yes, sir.

Q. You thought you would do your work before the car got in full headway?

A. Yes, sir.

Q. When you got that work done, then what would you do?

A. I sat down on the train and watch it as it goes down the mountain to see if anything sticks.

Redirect examination.

Questions propounded by Mr. McDonough:

Q. Did you help put out the car at Howard?

A. Yes, sir.

Witness excused.

455

Testimony of J. J. Richards.

J. J. RICHARDS, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Richards, where do you live?

A. De Queen, Arkansas.

Q. What is your business, Mr. Richards?

A. Car inspector for the Kansas City Southern.

Q. How long have you been car inspector?

A. About two years and a half.

Q. What experience have you had in the railroad work?

A. I have been railroading since 1892 in different departments.

Q. What kind of work, generally?

A. Track work, firing, in the car service.

Q. State whether or not your duties as an inspector require you to examine the hand holds, grab irons and ladders on cars?

A. Yes, sir, it does.

Q. Were you inspecting at De Queen on March 23rd and March 24th, 1913, this year?

A. Yes, sir; I was on the day shift at that time.

Q. Did you have anything to do with the inspection there in coming in or in going out of National Zinc car number seventeen?

A. Yes, sir; I cut the train out. I didn't inspect the car any. I cut the train out that it was in.

Q. State what condition the grab irons and hand holds on that car were?

456 A. Well, we don't make a thorough inspection of the cars going out. When they come in the man that is in charge makes a thorough inspection as to the safety devices. In cutting the cars out we really make an inspection.

Q. Who were the night inspectors?

A. J. R. Sanders and C. H. Miller.

Q. When that car went out on what train did it go?

A. It went out on an extra.

Q. What day?

A. On the 24th. Do you want the exact time it left town?

Q. Yes?

A. It left De Queen at 9:17 on the extra 704 engine.

Q. Who was the engineer?

A. Tom Clayton.

Q. Had you while that car was there, yourself, I mean car number seventeen made any inspection of the car?

A. No, sir; I had not.

Q. When you made up the train that morning did you see anything wrong with the hand holds?

A. No, sir.

Q. State whether or not the air on that train was in order when you started it out?

A. Yes, sir, the air was in good shape.

Cross-examination.

Questions by Judge FEAZEL:

Q. Mr. Richards, you don't know whether that tank car, the National Zinc car he calls it had any grab irons at all, do you, or hand hold?

A. I was supposed to have.

457 Q. I am talking about what you know?

A. Well, yes, sir, I know it had some. It couldn't get out without having some on it.

Q. You say you didn't inspect it for that purpose?

A. I didn't make a close inspection of it.

Q. Do you remember having inspected it at all with reference to grab irons and hand holds?

A. I didn't make no close inspection, no sir.

Q. How about the other car, the S. F. R. D.?

A. We examined them the same as we did the others in going out.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. Did you examine in the yard here at Ashdown since the adjournment of court here this afternoon a National Zinc car and a Santa Fe refrigerator car?

A. Yes, sir.

Q. Did you make any effort to get from the side ladder of the Santa Fe refrigerator car over to the National Zinc car?

A. Yes, sir.

Q. State whether or not you could make that passage by holding your left hand on the hand holds of the side ladder and at the same time get hold on the railing of the National Zinc car?

A. Yes, sir.

Q. In order to get on the National Zinc car was it necessary for you to turn loose your hold on the refrigerator car?

A. No sir, I could reach it.

458 Recross-examination.

Questions by Judge FEAZEL:

Q. You could reach it with difficulty, couldn't you?

A. Well, a man could reach it all right.

Q. It was quite difficult, wasn't it?

A. I couldn't say that it was.

Q. Where are those cars?

A. They are down there in the yards close to the depot in Ashdown.

Q. Any others like them?

A. No, sir, I don't believe there was any other cars coupled to them.

Q. Just those two standing alone?

A. Yes, sir.

Q. What track were they on?

A. It would be called a house track I suppose. I judge it would be the west side of the depot.

Q. Are they up behind the depot or sorter down the track from the depot?

A. The best of my recollection they are just a little beyond the depot, or about the far end of the depot, something like that.

Q. It would be more difficult to make that passage if the train was running than if the train was standing?

A. Yes, sir.

Q. And if the car was jostling or lurching or jerking it would still be more dangerous?

A. It naturally would be, yes, sir. A man would have to be more particular.

459 Redirect examination.

Questions by Mr. McDONOUGH:

Q. Mr. Richards, if there was an end ladder from that refrig-

erator car and you should get on that ladder and attempt to come down and you should fall into what place would you go?

A. You would fall between the cars. You would be more than likely to unless something struck you that threw you out.

Q. State whether or not the rail and the wheel would be right behind you where it would be likely to run over you?

A. Yes, sir.

Q. Mr. Richards, in going down the end of the car if the brakeman comes over the end and he faces the car, does he not, as he comes down the end ladder?

A. Yes, sir.

Q. If he came down the side ladder he would face the car?

A. Yes, sir.

Q. Of course if he came down the end ladder he would naturally face the car.

A. Yes, sir.

Q. If he should go down the lower end of the ladder if it was the end, wouldn't he have to turn himself in order to go face foremost in order to get on the tank car next to him?

A. Yes, sir.

Q. He couldn't very easily step backward that distance?

A. He could reach the — by stepping backward, but he
460 couldn't get hold of the hand holds on the tank. He could reach the tank by stepping backward all right.

Q. Isn't that dangerous for a man to step backwards in a position where he has got no purchase to the front? Doesn't that put him in a position where he can't handle himself? In other words, wouldn't it be more dangerous to have to go backward there where he couldn't reach that hand hold, I mean the railing, than it would to get on the side ladder and go sideways over there where he could reach it and at the same time hold on to the other one? Wouldn't the ladder method be less dangerous than to go down the end ladder and go backward on the car?

A. You mean if there was an end ladder on it?

Q. Yes, sir.

A. Well, I am not a brakeman. I couldn't say just how they practically do that, but it naturally occurs to me that it would.

Q. I am simply asking your opinion as a car inspector.

Recross-examination.

Questions by Judge FEAZEL:

Q. You say you have had no experience at all as a brakeman?

A. Not as a brakeman, no sir.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. Could you under your rules and regulations from your company, in De Queen, if those hand holds of the National Zinc car

461 and the refrigerator car which were similar to those you saw here this afternoon, under your instructions from your company could you exclude that car from that train?

A. I could not.

Recross-examination.

Questions by Judge FEAZEL:

Q. You could have put another hand hold on the one above the one that was generally on there?

A. I could do it.

Q. You wouldn't have been violating any rules either, would you?

A. Yes, sir, because we are not repairing cars in the yards.

Q. How long would it have taken you to put that on there?

A. I wouldn't have took very long to put one on, but to make it a standard safety appliance it would have taken sometime.

Q. You say it wouldn't take long? twenty or thirty minutes, is that what you mean by that?

A. It wouldn't take long. I suppose a man could have done it in an hour, something like that.

Q. The railroad company keeps them already prepared?

A. Yes, they keep them on hand as a general thing.

Redirect examination.

By Mr. McDONOUGH:

Q. They put one on when one goes out?

A. Yes, sir, when one comes in missing we put one in its place. We Bad Order the car and put a tag on it and it is switched over to the side tracks and it is repaired over there.

Witness excused.

462

Testimony of C. H. Miller.

C. H. MILLER, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions by Mr. McDonough:

Q. Mr. Miller, where do you live?

A. De Queen.

Q. What business are you engaged in?

A. Car inspector.

Q. For what Company?

A. K. C. S.

Q. Were you car inspector on March 22nd, 1913; that is March of this year, at De Queen?

A. Yes, sir.

Q. Were you one of the inspectors that inspected National Zinc car number 17 and Santa Fe refrigerator car number 6239?

A. Yes, sir.

Q. What day did you inspect that?

A. It was on the 23rd—22nd or 23rd.

Q. Of March, 1913?

A. Yes, sir. I believe it was on the 22nd.

Q. Is that the day they came into De Queen?

A. Yes, sir.

Q. Do you know what direction they came from?

A. South.

Q. What inspection, if any, did you make of the hand holds and appliances on car 6239, the Santa Fe refrigerator car?

A. We gave it an inspection and finding the Santa Fe appliances on that was there according to book rules.

463 Q. Were they or were they not in good condition?

A. As far as I could see.

Q. You made a careful inspection of them, did you?

A. Well, I can't say I made any more careful inspection than I did any other cars but we take pains to look after all of them.

Q. That is your duty?

A. Yes, sir.

Q. It is your duty to inspect those cars and see if there is anything wrong with the hand holds?

A. Yes, sir.

Q. You made a record of that, did you, at the time?

A. Well, I don't keep the record book.

Q. Who does keep it?

A. Mr. Sanders.

Q. He was one of the inspectors with you?

A. Yes, sir; he is the man that kept the record.

Q. He is here as a witness?

A. Yes, sir.

Q. State whether or not, under your rules and instructions you would have been authorized to condemn that refrigerator car because it didn't have hand holds upon the end?

A. Well, we couldn't have done it. According to book of rules we couldn't turn it down.

Q. What book of rules do you refer to?

A. To the Safety Appliance Law; the Federal law.

Judge FEAZEL: I move to exclude that answer.

COURT: That is not competent.

Defendant excepted to the ruling of the Court.

464 Q. Were those instructions given you by the head company?

A. Yes, sir.

Q. And under those instructions you were not authorized to turn the car down because it didn't have ladders on the end?

A. No, sir.

Q. Now, as to the second car, number seventeen, was there anything wrong with the hand holds and grab irons on that car and railings?

A. It was all there.

Q. Did you this afternoon, after the adjournment of court examine National Zinc car and refrigerator car attached together down here in the yards at Ashdown?

A. I did.

Q. Did you make an effort to pass from the side ladder of the refrigerator car onto the platform of the Zinc car?

A. I did.

Q. Could you with your right hand get hold of the railing on the National Zinc car while still holding to the hand rail on the refrigerator car?

A. I did.

Q. What is your height?

A. Five feet and five and a half I believe.

Q. Five feet, five and a half inches?

A. Yes, sir.

Q. And your weight is what?

A. 148.

Q. You know what your reach of arm is from hand to hand when your arms is extended horizontally?

465 A. No, sir, I do not.

Cross-examination.

Questions by Judge FEAZEL:

Q. What did you step on: the platform?

A. Yes, sir.

Q. On the tank car?

A. Yes, sir.

Q. You landed on the platform?

A. Yes, sir.

Q. You could hold to the side railing of the tank car?

A. Yes, sir.

Q. Before you turned the grab iron loose on the box car?

A. Yes, sir, I first put my foot over on the tank and then held with my left hand to the refrigerator and reached for the railing on the tank.

Q. Those cars were standing still then?

A. Yes, sir.

Q. Suppose the train were running, don't you think that it would have been rather difficult?

A. Well, it would have been more dangerous than standing still, yes, sir.

Q. Suppose while running it was also lurching and jerking while running it would still — been more dangerous?

A. Yes, sir, it would have looked more dangerous.

Q. We can illustrate it on a small scale this way. Here is your side ladder (indicating). Suppose this book to be a box car, that is the tank car? (indicating).

A. Yes, sir.

Q. Your end ladder is on the right hand side. Let's fix
466 it like the car stands, the ladder on the refrigerator is on this side?

A. On that side?

Q. Yes, sir. Now then the landing place on the tank car is the floor of the tank car, is it not?

A. Yes, sir.

Q. How close to the end now does that railing on the side of the tank car come?

A. Well, I never measured it.

Q. You don't know?

A. No, I couldn't say just how far it is.

Q. Now then, suppose that train had been running at that time, you are standing here on this train when you make your step, your feet would naturally press back that way from the direction you were stepping?

A. If it would *split* any way it would slip back this way, certainly.

Q. Then there would be nothing to stop your feet from slipping except the far end of that foot rest?

A. That is all.

Q. That is sixteen inches from the end of the grab iron next to the tank car?

A. Yes, sir, something like that.

Q. Now then suppose there had been an end ladder on the end of that refrigerator car or there had been another grab iron or hand hold up like a man's shoulder from the lower grab iron couldn't he have come around that corner, hold to the side ladder,
467 pass upon the lower grab iron on the end and hold to the other one and step more easily and with more safety from there to the platform of the tank car than he could from that side ladder?

A. Well, there is two ways to look at that.

Q. I am talking about when the train is in motion wouldn't it have been safer?

A. Well, when the train is in motion if you are jerked in between the cars and fall, you are bound to fall under but if you are here, then you may fall to the right.

Q. But there is no occasion for you to fall there if those things were securely put in, is there? There is no reason why you should fall, is there?

A. No, if a man would be particular it looks as though—

Q. When you make your spring to take your step from the end ladder your foot presses against the body of the car?

A. Yes, sir.

Q. It does not on the side ladder?

A. It has a tendency to slip back.

Q. Then, is it not your opinion that the chances of slipping would be much less from the ladder or grab iron on the end of the car than the ladder on the side of the car?

A. They may be less apt to slip but then I couldn't say it would reduce the danger any.

Q. You never had any experience as a brakeman?

A. No, sir.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. Mr. Miller, I will ask you if you didn't see Mr. Morrell or some one else on that Santa Fe refrigerator car put his foot upon
468 the end of that end hand hold or end grab iron and then hold to the brake staff which runs right up in front and try to reach back and catch that railing and was unable to reach it?

A. Yes, sir, he would be fully as far by holding to the brake staff of the refrigerator car, he would be fully as far from the hand rail of the tank as he would be holding to the side of the refrigerator and catching the hand railing on the tank.

Witness excused.

469

Testimony of J. R. Sanders.

J. R. SANDERS, the next witness called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDonough:

Q. Mr. Sanders, where do you live?

A. De Queen.

Q. What business are you in?

A. Car inspector.

Q. With what company?

A. K. C. S.

Q. How long have you been a car inspector?

A. For this company?

Q. Yes?

A. Three years for this company.

Q. How long have you been a car inspector altogether for all companies?

A. About fourteen years.

Q. Have you ever served as a brakeman or switchman?

A. No, sir.

Q. State whether or not your duty as car inspector calls you to inspect cars in De Queen on March 22nd or 23rd, this year?

A. Yes, sir; I was inspecting then.

Q. Did you keep a record of those inspections?

A. Yes, sir.

Q. State whether or not you inspected National Zinc car on either of those dates?

A. Yes, sir, I did on the night of the 22nd.

Q. State what kind of an inspection you made of it?

470

A. Well, I just made a general inspection.

Q. Did you inspect the grab irons and hand holds?

A. Yes, sir.

Q. State whether or not you inspected them carefully including the railing on the car?

A. I did.

Q. Did you find anything wrong with them?

A. Not a thing, no, sir.

Q. State whether or not you at the same time inspected Santa Fe refrigerator car number 6239?

A. Yes, sir.

Q. Keep a record of that also?

A. Yes, sir.

Q. State whether or not there was anything wrong with the ladders or hand holds on that car?

A. Nothing wrong, no, sir.

Q. State whether or not, under the rules and regulations of your company you had any right or had any power to exclude those cars finding the hand holds and ladders and brake appliances as you found them?

A. No, they were safe to go as we understand the Safety Appliance laws up to that time.

COURT: Under the instructions of your company what the Safety Appliance Act requires, that is incompetent. Gentlemen of the jury it is cropping out here in these witnesses, a number of them, is not intentional, about their inspection of the cars being in compliance with the Safety Appliance Act. That is not a matter for your consideration. It is not proper for the witnesses to testify that.

471 As to what the law is it is not for the witnesses to say.

Mr. McDONOUGH: I save an exception.

Q. You mean what you have said on that, according to the instructions and rules given you, those cars were safe to go?

A. Yes, sir, that is what I mean.

Q. Did you examine two cars, a National Zinc car and a refrigerator car this afternoon after Court?

A. Yes, sir.

Q. Did you make any effort to go from the refrigerator car—from the side ladder of the refrigerator car to the Zinc car?

A. I never.

Q. Did you see anybody else make the effort?

A. I did.

Q. State whether or not the party was able to grasp with his right hand the rail of the Zinc car and at the same time hold onto the hand hold on the ladder of the refrigerator?

A. Yes, sir.

Q. Is there, or is there not, at the end of the Zinc car and right next to the side a grab iron of any kind?

A. Yes, sir, there is a grab iron on the end sill and a grab iron on the side sill.

Q. Those both were there on car seventeen at the time you examined them?

A. Yes, sir.

Q. State whether or not you saw anyone attempt to stand on the grab iron on the end of the refrigerator car and hold to the
472 brake staff and then attempt to reach down and get hold of the rail of the tank car?

A. Yes, sir.

Q. Can that be done?

A. No, sir, not without turning loose of the brake staff.

Q. But you can reach from the ladder on the end of the refrigerator car and catch hold of that railing on the tank car?

A. Yes, you can stand with one foot on the grab iron on the side of the refrigerator and the other foot on the end sill of the tank and hold on the refrigerator and the railing on the tank at the same time.

Cross-examination.

Questions by Judge FEAZEL:

Q. You state he couldn't reach from the brake staff to the railing on the tank car?

A. The refrigerator has one end grab iron on each side of the coupling. You can't stand with your foot on that and hold the grab iron with one hand and the brake staff with the other hand and step back on the tank or you can't hold the brake staff and catch the railing of the tank.

Q. Where is the brake staff?

A. The brake staff is on the right hand side of the coupler on the bend.

Q. That is near the center of the car, isn't it?

A. Yes, sir.

Q. Now then, suppose you had a grab iron or a hand hold about as high as a man's shoulder above the one down near the bottom of that refrigerator car, he could have held that and reached
473 over and got over all right, couldn't he?

A. No, because his back would have been to the tank.

Q. Why would his back have to be to the tank?

A. Well, he is holding with his face to the refrigerator.

Q. Do you mean to tell the jury a man comes down those ladders with his toes next to the car.

A. He comes down with his toes against the car.

Q. Why should he do that? Why couldn't he put his foot up lengthways with the grab iron and come down?

A. Sideways?

Q. Yes?

A. I don't know. He might if he should exert himself, that is in the way I noticed them doing.

Q. You have never had any experience braking?

A. I haven't had any experience.

Q. You don't know how they do that?

A. Yes, sir, I do.

Q. They come down then on their toes?

A. Yes, sir.

Q. And step backwards on to the car in front of them?

A. No, they step sideways.

Q. Where you got end ladders I am talking about. They step backwards to go across there?

A. Well, they could turn round.

Q. Let their foot rest lengthways in that end ladder and just step right over there and grab hold of that rail in perfect safety?

A. When you put your foot that way it is more dangerous
474 than the other way.

Q. Why?

A. Because, have got less ground to slip on.

Q. You have only got your toes the other way?

A. You have got two inches.

Q. Now, if you come down on your toes all you have got is just two inches of your toe? Q. Whereas, if you come down with your foot lengthways you have got more than half the foot.

A. You have got half the foot to stand lengthwise with the grab iron, which means about an inch or inch and a quarter.

Q. Those cars in that train you saw those people trying to go from one car to the other, they were standing still?

A. Yes, sir.

Q. Did they have any difficulty in making that reach you are talking about from the side of the car?

A. Didn't have a bit in the world.

Q. Wouldn't it be more dangerous to make that passage when the cars are jerking than it would to come down on the end ladder and step across?

A. I don't think so.

Q. You would have been nearer wouldn't you?

A. It would have been nearer but it would have been more dangerous.

Q. Why?

A. In the first place you are between the cars; that is more dangerous itself; then the next place you have got to come down between the cars and turn around and catch that grab iron
475 or catch the side ladder or the railing of the tank.

Q. You would be nearer, wouldn't you, if you had the end ladder, to the landing place?

A. It would be an inch or two nearer.

Q. Is that all, an inch or two?

A. Just a few inches.

Q. You tell this jury just an inch or two? What do you mean by a few inches?

A. Here is the grab iron (indicating) right there where you come down this grab iron you are facing—when you come down here you are facing this car and you come down holding it this way. Generally when you get to the bottom you are just this way holding it sorter, and to catch this car you have got to turn around.

Q. How close are those side ladders to the end of the car?

A. Some go against the end of the ladder and go around.

Q. How close is this?

A. A couple of inches?

Q. You mean it is fastened?

A. Yes, sir.

Q. The end of the grab iron next to the end of the car is fastened to the end of the corner of the car?

A. Yes, sir.

Q. The balance of the grab iron goes back on the body of the car?

A. They make a crook.

Q. How long is that crook?

A. The grab iron is supposed to be twenty-four inches.

476 Q. I am talking about the crook in the grab iron?

A. Twenty-four inches, supposed to be.

Q. Can you tell me how much that crook is? You told me that bolt that is fastened is two inches from the end of the car. Now, is that square?

A. It comes straight down, just enough at the end for the bolt to come through.

Q. Now then, a man in making his spring from that side ladder, there is nothing on that grab iron to keep his foot from slipping back that way?

A. Nothing but that end grab iron.

Q. What end grab iron?

A. On the end.

Q. What does he hold to?

A. He holds to the side grab iron.

Q. You mean to tell the jury he holds to the side grab iron with his hand, put his foot on the lower grab iron on the end of the car, rests his foot on there and he has got to step around the corner of the car, hasn't he?

A. He is standing at the corner of the car?

Q. But he is on the side of the car and he has got to get around the corner some way, hasn't he?

A. Yes, sir.

Q. In order to get to the end he has got to put his foot around the corner of the car and get around to the end with nothing on the end to hold to with his hand?

A. He has got the side grab irons, about six of them.

Q. I am talking about the ends. I asked you if he had anything on the end of the car to hold to?

477 A. Not unless he has got end grab irons.

Q. Now, you say under the instructions you have received from your company, you wouldn't be authorized to put a grab iron up there about the height of a man's shoulder?

A. I have never been instructed to.

Q. Have you been forbidden to?

A. No, sir.

Q. The railroad companies use each others' cars interchangeably?

A. Yes, sir.

Q. If you thought a grab iron up about the end of the car about as high as a man's shoulder necessary for the safety of the brakeman you would have a right to put it there, wouldn't you?

A. Yes, sir.

Q. The company owning the car would pay that charge, wouldn't it?

A. I don't know whether they would or not.

Q. Anyway you would have a right to put it there if you thought it necessary?

A. I would put it there, but under the M. C. B. rules I don't believe they would pay for it.

Q. What do you mean by the M. C. B.?

A. Master Car Builders' Association.

Q. Have you got those rules?

A. No, sir.

Q. Why haven't you got them?

A. I didn't think I needed them.

478 Judge FEAZEL: I want to move to exclude his answer about the Master Car Builders' Association.

Court: About whether that would be paid for, that isn't admissible.

Mr. McDONOUGH: I save an exception.

Mr. McDONOUGH: I desire to offer in testimony the order of the Interstate Commerce Commission made the 13th day of March, 1911, extending the time for making changes on cars to July 1st, 1916.

Court: I don't think that is a matter for the jury.

Mr. McDONOUGH: I offer it, and the Court excludes it?

Court: Yes, sir.

Defendant at the time excepted to the ruling of the Court and asked that its exceptions be noted of record, which is done.

Mr. McDONOUGH: Now then, I offer in testimony that part of the Interstate Commerce Commission's order that applies to cars constructed as the National Zinc Company's car. I have no objection to the whole of the order going in except that it encumbers the record. It is on page 13, and applies to tank cars with side platforms. I offer that showing the number of hand holds or grab irons required on cars like the National Zinc Company cars, which order is to take effect July 1st, 1916, as shown by the certificate. The order is duly certified to by the Secretary and has the seal of the Commission on it.

Court: That will be excluded.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

479 Mr. McDONOUGH: I offer the whole order. I don't think it all has anything to do with the case, and the court excludes it?

Court: Yes, sir.

Defendant at the time excepted to the ruling of the Court and asked that its exceptions be noted of record, which is done.

Witness excused.

Orders offered are as follows:

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 13th Day of March A. D. 1911.

Present:

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

In the matter of the extension of the period within which common carriers shall comply with the requirements of an act entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance acts, and for other purposes," approved April 14, 1911, as amended by "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911.

Whereas, pursuant to the provisions of the act above stated, the Interstate Commerce Commission, by its orders duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location, and manner of application of the appliances provided for by section 2 of the act aforesaid and section 3 of the act of March 2, 1893, as amended April 1, 1896, and March 3, 1903, known as the "Safety Appliance Acts"; and whereas the matter of extending the period within which common carriers shall comply with the provisions of section 2 of the act first aforesaid being under consideration, upon full hearing and for good cause shown

It is ordered, That the period of time within which said common carriers shall comply with the provisions of section 3 of said act in respect of the equipment of cars in service on the 1st day of July 1911, be, and the same is hereby, extended as follows, to wit:

Freight-train Cars.

(a) Carriers are not required to change the brakes from right to left side on steel or steel-underframe cars with platform end sills, to change the end ladders on such cars, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed in said order of March 13, 1911.

(b) Carriers are granted an extension of five years from July 1911, to change the location of brakes on all cars other than those designated in paragraph (a) to comply with the standards prescribed in said order.

(c) Carriers are granted an extension of five years from July 1, 1911, to comply with the standards prescribed in said order in respect of all brake specifications contained therein, other than those designated in paragraphs (a) and (b), on cars of all classes.

(d) Carriers are not required to make changes to secure additional end-ladder clearance on cars that have 10 or more inches end-ladder clearance, within 30 inches of side of car, until car is shopped for work amounting to practically rebuilding body of car, at which time they must be made to comply with the standards prescribed in said order.

(e) Carriers are granted an extension of five years from July 1, 1911, to change cars having less than 10 inches end-ladder clearance, within 30 inches of side of car, to comply with the standards prescribed in said order.

(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running boards, ladders, sill steps, and brake staffs: Provided, That the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight-train cars where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order.

Passenger-train Cars.

(h) Carriers are granted an extension of three years from July 1, 1911, to change passenger-train cars to comply with the standards prescribed in said order.

Locomotives, Switching.

(i) Carriers are granted an extension of one year from July 1, 1911, to change switching locomotives to comply with the standards prescribed in said order.

Locomotives, Other Than Switching.

(j) Carriers are granted an extension of two years from July 1, 1911, to change all locomotives of other classes to comply with the standards prescribed in said order.

A true copy.

EDW. A. MOSELEY,
Secretary.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 10th Day of October, A. D. 1910.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

In re Standard Height of Drawbars.

Whereas, by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and

Whereas, a hearing in the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910,

Now, therefore, in pursuance of and in accordance with the provisions of said section 3 of said act,

It is ordered, That (except on cars specified in the proviso in section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed—to wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31½ inches, and on narrow-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 17½ inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be 14½ inches.

And it is further ordered, That such modification or change shall become effective and obligatory December 31, 1910.

A true copy.

EDW. A. MOSELEY,
Secretary.

482 Before the Interstate Commerce Commission.

United States Safety-appliance Standards.

October 13, 1910.

Order of the Commission.

482a *Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 13th Day of October, A. D. 1910.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

In the Matter of Designating the Number, Dimensions, Location, and Manner of Application of Certain Safety Appliances.

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: Provided,

That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29th and 30th and October 7th, 1910, respectively;

Now, therefore, in pursuance of and in accordance with the provisions of said section three of said act,

It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:

Box and Other House Cars.

Hand-brakes.

Number:

Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions:

The brake-shaft shall be not less than one and one-fourth ($1\frac{1}{4}$) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16), inches in diameter, of malleable iron, wrought iron or steel.

Location:

The hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application:

There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

482b Top brake-shaft support shall be fastened with not less than one half ($\frac{1}{2}$) inch bolts or rivets. (See Plate A.)

A brake-shaft step shall support the lower end of brake-shaft. A

brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred. (See Plate A.)

Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths ($\frac{7}{8}$) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-chain shall be of not less than three-eighths ($\frac{3}{8}$), preferably seven-sixteenths ($\frac{7}{16}$), inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenths ($\frac{7}{16}$), preferably one-half ($\frac{1}{2}$), inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half ($\frac{1}{2}$) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.)

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths ($\frac{3}{4}$), preferably one (1), inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring. (See Plate A.)

Brake-shaft drum shall be not less than one and one-half ($1\frac{1}{2}$) inches in diameter. (See Plate A.)

Brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square fit shall be not less than one and five-sixteenths ($1\frac{5}{16}$) inches square. When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth ($5\frac{1}{4}$), preferably five and one-half ($5\frac{1}{2}$), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth. (See Plate A.)

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five-eighths ($\frac{5}{8}$) of an inch in diameter, or upon a trunnion secured by not less than one-half ($\frac{1}{2}$) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths ($\frac{3}{4}$) of an inch in diameter; said nut shall be secured by riveting over or by the use of a lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square fit for brake-shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-step.

If brake-step is used, it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a

vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Manner of Application:

Brake-step shall be supported by not less than two metal braces having a minimum cross-sectional area three-eighths ($\frac{3}{8}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, which shall be securely fastened to body of car with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Running-boards.

Number:

One (1) longitudinal running-board.

On outside-metal-roof cars two (2) latitudinal extensions.

Dimensions:

Longitudinal running-board shall be not less than eighteen (18) preferably twenty (20), inches in width.

Latitudinal extensions shall be not less than twenty-four (24) inches in width.

Location:

Full length of car, center of roof.

On outside-metal-roof cars there shall be two (2) latitudinal extensions from longitudinal running-board to edge of roof above ladder locations, except on refrigerator cars where such latitudinal extensions cannot be applied on account of ice hatches.

Manner of Application:

Running-boards shall be continuous from end to end and not cut or hinged at any point: Provided, That the length and width of running-boards may be made up of a number of pieces securely fastened to saddle-blocks with screws or bolts.

The ends of longitudinal running-board shall be not less than six (6) nor more than ten (10) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill and if more than four (4) inches from edge of roof of car, shall be securely supported their full width by substantial braces.

Running-boards shall be made of wood and securely fastened to car.

Sill-steps.

Number:

Four (4).

Dimensions:

Minimum cross-sectional area one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum clear depth, eight (8) inches.

482c Location:

One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Sill-steps exceeding eighteen (18) inches in depth shall have an additional tread.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Ladders.

Number:

Four (4).

Dimensions:

Minimum clear length of tread: Side ladders sixteen (16) inches; end ladders fourteen (14) inches.

Maximum spacing between ladder-treads, nineteen (19) inches.

Top ladder-tread shall be located not less than twelve (12) nor more than eighteen (18) inches from roof at eaves.

Spacing of ladder-treads shall be uniform, within a limit of two (2) inches from top ladder-tread to top tread of sill-step.

Hard-wood treads, minimum dimensions one and one-half ($1\frac{1}{2}$) by two (2) inches.

Iron or steel treads, minimum diameter five-eighths ($\frac{5}{8}$) of an inch.

Minimum clearance of treads, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) on each side, not more than eight (8) inches from right end of car; one (1) on each end, not more than eight (8) inches from left side of car; measured from inside edge of ladder-stile or clearance of ladder-treads to corner of car.

Manner of Application:

Metal ladders without stiles near corners of cars shall have foot guards or upward projections not less than two (2) inches in height near inside end of bottom treads.

Stiles of wooden ladders will serve as foot-guards.

Ladders shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets. Three-eighths ($\frac{3}{8}$) inch bolts may be used for wooden treads which are gained into stiles.

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Roof-handholds.

Number:

One (1) over each ladder.

One (1) right-angle handhold may take the place of two (2) adjacent specified roof-handholds, provided the dimensions and locations coincide, and that an extra leg is securely fastened to car at point of angle.

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

On roof of car: One (1) in line with, and running parallel to, treads of each ladder, not less than eight (8) nor more than fifteen (15), inches from edge of roof, except on refrigerator cars where ice hatches prevent, when location shall be not less than four (4) inches from edge of roof.

Manner of Application:

Roof-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.

Number:

Four (4).

[Tread of side-ladder is a side-handhold.]

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, except as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Side-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

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Horizontal End-handholds.**Number:**

Eight (8) or more. (Four (4) on each end of car.)

[Tread of end-ladder is an end-handhold.]

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

A handhold fourteen (14) inches in length may be used where it is impossible to use one sixteen (16) inches in length on end-sills.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) near each side on each end of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, except as provided above, when tread of end-ladder is an end-handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill or sheathing over end-sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

On each end of cars with platform end-sills six (6) or more inches in width, measured from end-post or siding and extending entirely across end of car, there shall be one additional end-handhold not less than twenty-four (24) inches in length, located near center of

car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application:

Horizontal end-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Vertical End-handholds.

Number:

Two (2) on full-width platform end-sill cars, as heretofore described.

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, eighteen (18), preferably twenty-four (24), inches.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$) inches.

Location:

One (1) on each end of car opposite ladder, not more than eight (8) inches from side of car; clearance of bottom end of handhold shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

Manner of Application:

Vertical end-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Uncoupling-levers.

Number:

Two (2).

Uncoupling-levers may be either single or double, and of any efficient design.

Dimensions:

Handles of uncoupling-levers, except those shown on Plate B or of similar designs, shall be not more than six (6) inches from sides of car.

Uncoupling-levers of design shown on Plate B and of similar designs shall conform to the following-prescribed limits:

Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift-arms shall be not less than seven (7) inches long.

Center of eye at end of center lift-arm shall be not more than three and one-half ($3\frac{1}{2}$) inches beyond center of eye of uncoupling-pin.

of coupler when horn of coupler is against the buffer-block or end-sill. (See Plate B.)

Ends of handles shall extend not less than four (4) inches below bottom of end-sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See Plate B.)

Handles of uncoupling-levers of the "rocking" or "push-down" type shall be not less than eighteen (18) inches from top of rail when lock-block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

Location:

One (1) on each end of car.

When single lever is used it shall be placed on left side of end of car.

Hopper Cars and High-side Gondolas with Fixed Ends.

[Cars with sides more than thirty-six (36) inches above the floor are high-side cars.]

Hand-Brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of, and not more than twenty-two (22) inches from, center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

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Sill-Steps.

Same as specified for "Box and other house cars."

Ladders.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars," except that top

ladder-tread shall be located not more than four (4) inches from top of car.

Location:

Same as specified for "Box and other house cars."

Manner of Application:

Same as specified for "Box and other house cars."

Side-handholds.

Same as specified for "Box and other house cars."

Horizontal End-handholds.

Same as specified for "Box and other house cars."

Vertical End-handholds.

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel, brake-step or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Drop-end High-side Gondola Cars.

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

Ladders.

Number:

Two (2).

Dimensions:

Same as specified for "Box and other house cars," except that top ladder-tread shall be located not more than four (4) inches from top of car.

Location:

One (1) on each side, not more than eight (8) inches from right end of car, measured from inside edge of ladder-stile or clearance of ladder-treads to corner of car.

Manner of Application:

Same as specified for "Box and other house cars."

Side-handholds.

Same as specified for "Box and other house cars."

Horizontal End-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, other

than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Fixed-end Low-side Gondola and Low-side Hopper Cars.

[Cars with sides thirty-six (36) inches or less above the floor are low-side cars.]

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not more than twenty-two (22) inches from center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

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Side-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

Horizontal End-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each side on each end of car not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Drop-end Low-side Gondola Cars.**Hand-brakes.****Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

*Side-handholds.**Number:*

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

*End-handholds.**Number:*

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Flat Cars.

[Cars with sides twelve (12) inches or less above the floor may be equipped the same as flat cars.]

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on the end of car to the left of center.

482g Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

Side-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

End-Handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

*Tank-cars with Side-platforms.***Hand-brakes.****Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

Side-handholds.**Number:**

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank-bands, four (4) additional vertical handholds shall be applied, one (1) over each sill-step and securely fastened to tank or tank-bands.

Manner of Application:

Same as specified for "Box and other house cars."

End-handholds.**Number:**

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Tank-head Handholds.

Number:

Two (2). [Not required if safety-railing runs around ends of tank.]

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel. Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Location:

Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application:

Tank-head handholds shall be securely fastened.

Safety-railings.

Number:

One (1) continuous safety-railing running around sides and ends of tank, securely fastened to tank or tank-bands at ends and sides of tank; or two (2) running full length of tank at sides of car supported by posts.

Dimensions:

Not less than three-fourths ($\frac{3}{4}$) of an inch, iron.

Location:

Running full length of tank either at side supported by posts or securely fastened to tank or tank-bands, not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application:

Safety-railings shall be securely fastened to tank-body, tank-bands or posts.

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

482h Tank Cars Without Side-sills and Tank Cars with Short Side-sills and End-platforms.

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Running-boards.

Number:

One (1) continuous running-board around sides and ends; or two (2) running full length of tank, one (1) on each side.

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application:

If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

Sill-steps.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side under side-handhold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Same as specified for "Box and other house cars."

Ladders.

[If running-boards are so located as to make ladders necessary.]

Number:

Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

Dimensions:

Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half ($1\frac{1}{2}$) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths ($\frac{5}{8}$) of an inch.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

Manner of Application:

Ladders shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Side-handholds.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional vertical handholds shall be applied, one (1) over each sill-step and securely fastened to tank or tank-bands.

Manner of Application:

Same as specified for "Box and other house cars."

End-handholds.**Number:**

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Tank-head Handholds.**Number:**

Two (2). [Not required if safety-railing runs around ends of tank.]

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

482i Location:

Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Manner of Application:

Tank-head handholds shall be securely fastened.

Safety-railings.**Number:**

One (1) running around sides and ends of tank or two (2) running full length of tank.

Dimensions:

Minimum diameter, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two and one-half ($2\frac{1}{2}$) inches.

Location:

Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

Manner of Application:

Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Tank Cars Without End-sills.**Hand-brakes.****Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

Running-boards.**Number:**

One (1).

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of tank.

Manner of Application:

If running-boards are applied below center of tank, outside edge of running boards shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when

closed with coupler-horn against the buffer-block, end-sill or back stop.

Running-boards shall be securely fastened to tank or tank-band.

Sill-steps.

Number:

Four (4). [If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.]

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car over sill-step, on running-board, projecting downward not more than two (2) inches from outside edge of running-board.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

Manner of Application:

Same as specified for "Box and other house cars."

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End-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side on each end of car on running-board, projecting downward not more than two (2) inches from edge of running-board, or on end of tank not more than thirty (30) inches above center line of coupler.

Manner of Application:

Same as specified for "Box and other house cars."

Safety-railings.

Number:

One (1).

Dimensions:

Minimum diameter seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Minimum clearance two and one-half ($2\frac{1}{2}$) inches.

Location:

Safety-railings shall be continuous around sides and ends of car, not less than thirty (30) nor more than sixty (60) inches above running-boards.

Manner of Application:

Safety-railings shall be securely fastened to tank or tank-bands, and secured against end shifting.

Uncoupling-levers.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars," except that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

Location:

Same as specified for "Box and other house cars," except that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

End-ladder Clearance.

No part of car above buffer-block within thirty (30) inches from side of car, except brake-shaft, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than exceptions herein noted, shall extend beyond the face of buffer-block.

*Caboose Cars with Platforms.***Hand-brakes.****Number:**

Each caboose car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars with platforms shall be located on platform to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Running-boards.**Number:**

One (1) longitudinal running-board.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Full length of car, center of roof. [On caboose cars with cupolas longitudinal running-boards shall extend from cupola to ends of roof.]

Outside-metal-roof cars shall have longitudinal extensions leading to ladder locations.

Manner of Application:

Same as specified for "Box and other house cars."

Ladders.**Number:**

Two (2).

Dimensions:

None specified.

Location:

One (1) on each end.

Manner of Application:

Same as specified for "Box and other house cars."

Roof-handholds.**Number:**

One (1) over each ladder.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Dimensions:

Same as specified for "Box and other house cars."

Location:

On roof of caboose, in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Manner of Application:

Same as specified for "Box and other house cars."

482k Cupola-handholds.**Number:**

One (1) or more.

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) continuous handhold extending around top of cupola not more than three (3) inches from edge of cupola-roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

Manner of Application:

Cupola-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside and riveted over or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.**Number:**

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, thirty-six (36) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) near each end on each side of car, curving downward

toward center of car from a point not less than thirty (30) inches above platform to a point not more than eight (8) inches from bottom of car. Top end of handhold shall be not more than eight (8) inches from outside face of end-sheathing.

Manner of Application:

Same as specified for "Box and other house cars."

End-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side on each end of car on face of platform end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of platform end-sill.

Manner of Application:

Same as specified for "Box and other house cars."

End Platform-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) right-angle handhold on each side of each end extending horizontally from door-post to corner of car at approximate height of platform-rail, then downward to within twelve (12) inches of bottom of car.

Manner of Application:

Handholds shall be securely fastened with bolts, screws, or rivets.

Caboose Platform-steps.

Safe and suitable box steps leading to caboose platforms shall be provided at each corner of caboose.

Lower tread of step shall be not more than twenty-four (24) inches above top of rail.

Uncoupling-levers.

Same as specified for "Box and other house cars."

Caboose Cars Without Platforms.

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars without platforms shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

Running-boards.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Full length of car, center of roof. [On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

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Side-door Steps.

Number:

Two (2) [if caboose has side-doors].

Dimensions:

Minimum length, five (5) feet.

Minimum width, six (6) inches.

Minimum thickness of tread, one and one-half (1½) inches.

Minimum height of back-stop, three (3) inches.

Maximum height from top of rail to top of tread, twenty-four (24) inches.

Location:

One (1) under each side-door.

Manner of Application:

Side-door steps shall be supported by two (2) iron brackets having a minimum cross-sectional area seven-eighths ($\frac{7}{8}$) by three (3) inches or equivalent, each of which shall be securely fastened to car by not less than two (2) three-fourth ($\frac{3}{4}$) inch bolts.

Ladders.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Same as specified for "Box and other house cars" except when caboose has side doors, then side-ladders shall be located not more than eight (8) inches from doors.

Manner of Application:

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Roof-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) over each ladder, on roof in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Manner of Application:

Roof-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Cupola-handholds.

Number:

One (1) or more.

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) continuous cupola-handhold extending around top of cupola, not more than three (3) inches from edge of cupola roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

Manner of Application:

Cupola-handhold shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside and riveted over or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

Side-door Handholds.

Number:

Four (4): Two (2) curved, two (2) straight.

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) curved handhold, from a point at side of each door opposite ladder, not less than thirty-six (36) inches above bottom of car, curving away from door downward to a point not more than six (6) inches above bottom of car.

One (1) vertical handhold at ladder side of each door from a point not less than thirty-six (36) inches above bottom of car to a point not more than six (6) inches above level of bottom of door.

Manner of Application:

Side-door handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

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Horizontal End-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Same as specified for "Box and other house cars," except that one (1) additional end-handhold shall be on each end of cars with platform end-sills as heretofore described, unless car has door in center of end. Said handhold shall be not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application:

Same as specified for "Box and other house cars."

Vertical End-handholds.

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

Passenger-train Cars With Wide Vestibules.

Hand-brakes.

Number:

Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

Side-handholds.

Number:

Eight (8).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, metal.

Minimum clear length, sixteen (16) inches.

Minimum clearance, one and one-fourth ($1\frac{1}{4}$), preferably one and one-half ($1\frac{1}{2}$), inches.

Location:

Vertical: One (1) on each vestibule door post.

Manner of Application:

Side-handholds shall be securely fastened with bolts, rivets or screws.

End-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2) preferably two and one-half ($2\frac{1}{2}$), inches.

Handholds shall be flush with or project not more than one (1) inch beyond vestibule face.

Location:

Horizontal: One (1) near each side on each end projecting downward from face of vestibule end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

End-handholds shall be securely fastened with bolts or rivets.

When marker-sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

Uncoupling-levers.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

Passenger-train Cars With Open End-platforms.

Hand-brakes.

Number:

Each passenger-train car shall be equipped with an efficient hand brake, which shall operate in harmony with the power-brake thereon.

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

End-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Dimensions:

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

Location:

Horizontal: One (1) near each side of each end on face of platform end-sill, projecting downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of end-sill.

Manner of Application:

End-handholds shall be securely fastened with bolts or rivets.

End Platform-handholds.

Number:

Four (4). [Cars equipped with safety-gates do not require end platform-handholds.]

Dimensions:

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches, metal.

Location:

Horizontal from or near door-post to a point not more than twelve (12) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform. Horizontal

horizontal portion shall be not less than twenty-four (24) inches in length nor more than forty (40) inches above platform.

482n Manner of Application:

End platform-handholds shall be securely fastened with bolts, rivets, or screws.

Uncoupling-levers.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

Passenger-train Cars Without End-platforms.

Hand-brakes.

Number:

Each passenger-train car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

Sill-steps.

Number:

Four (4).

Dimensions:

Minimum length of tread ten (10), preferably twelve (12), inches.

Minimum cross-sectional area one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, wrought iron or steel.

Minimum clear depth eight (8) inches.

Location:

One (1) near each end on each side not more than twenty-four (24) inches from corner of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than two (2) inches inside of face of side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16), preferably twenty-four (24), inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal or vertical: One (1) near each end on each side of car over sill-step.

If horizontal, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

If vertical, lower end not less than eighteen (18) nor more than twenty-four (24) inches above center line of coupler.

Manner of Application:

Side-handholds shall be securely fastened with bolts, rivets or screws.

End-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal: One (1) near each side on each end projecting downward from face of end-sill or sheathing. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

End-handholds shall be securely fastened with bolts or rivets.

When marker sockets or brackets are located so that they can not be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

End-handrails: [On cars with projecting end-sills.]

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) on each side of each end, extending horizontally from door-post or vestibule-frame to a point not more than six (6) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform end-sill; horizontal portion shall be not less than thirty (30) nor more than (60) inches above platform end-sill.

Manner of Application:

End hand-rails shall be securely fastened with bolts, rivets or screws.

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Side-door Steps.

Number:

One (1) under each door.

Dimensions:

Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum cross-sectional area, one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, wrought iron or steel.

Minimum clear depth, eight (8) inches.

Location:

Outside edge of tread of step not more than two (2) inches inside of face of side of car.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Side-door steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

A vertical handhold not less than twenty-four (24) inches in clear length shall be applied above each side-door step on door-post.

Uncoupling-levers.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachment shall be so applied that the coupler can be operated from the left side of car.

Steam Locomotives Used in Road Service.

Tender sill-steps.

Number:

Four (4) on tender.

Dimensions:

Bottom tread not less than eight (8) by twelve (12) inches, metal.

[May have wooden treads.]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location:

One (1) near each corner of tender on sides.

Manner of Application:

Tender sill-steps shall be securely fastened with bolts or rivets.

Pilot Sill-steps.

Number:

Two (2).

Dimensions:

Tread not less than eight (8) inches in width by ten (10) inches in length, metal.

[May have wooden treads.]

Location:

One (1) on or near each end of buffer-beam outside of rail and not more than sixteen (16) inches above rail.

Manner of Application:

Pilot sill-steps shall be securely fastened with bolts or rivets.

Pilot-beam Handholds.

Number:

Two (2).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14), preferably sixteen (16), inches.

Minimum clearance, two and one-half ($2\frac{1}{2}$) inches.

Location:

One (1) on each end of buffer-beam.

[If uncoupling-lever extends across front end of locomotives to within eight (8) inches of end of buffer-beam, and is seven-eighths ($\frac{7}{8}$) of an inch or more in diameter, securely fastened, with a clearance of two and one-half ($2\frac{1}{2}$) inches, it is a handhold.]

Manner of Application:

Pilot-beam handholds shall be securely fastened with bolts or rivets.

Side-handholds.

Number:

Six (6).

Dimensions:

Minimum diameter, if horizontal, five-eighths ($\frac{5}{8}$) of an inch; if vertical, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Horizontal, minimum clear length, sixteen (16) inches.

Vertical, clear length equal to approximate height of tank.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal or vertical: One (1) on each side of tender within six (6) inches of rear or on corner.

One (1) on each side of tender near gangway; one (1) on each side of locomotive at gangway; applied vertically.

Manner of Application:

Side-handles shall be securely fastened with not less than one-half ($1\frac{1}{2}$) inch bolts or rivets.

Rear-end Handholds.

Number:

Two (2).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14) inches.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

482p Location:

Horizontal: One (1) near each side of rear end of tender on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of tender.

Manner of Application:

Rear-end handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Uncoupling-levers.**Number:**

Two (2) double levers, operative from either side.

Dimensions:

Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location:

One (1) on rear end of tender and one (1) on front end of locomotive.

Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Manner of Application:

Uncoupling-levers shall be securely fastened with bolts or rivets.

Couplers.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Steam Locomotives Used in Switching Service.**Footboards.****Number:**

Two (2) or more.

Dimensions:

Minimum width of tread, ten (10) inches, wood.

Minimum thickness of tread, one and one-half ($1\frac{1}{2}$), preferably two (2), inches.

Minimum height of back-stop, four (4) inches above tread.

Height from top of rail to top of tread, not more than twelve (12) nor less than nine (9) inches.

Location:**Ends or sides.**

If on ends, they shall extend not less than eighteen (18) inches outside of gauge of straight track, and shall be not more than eight (8) inches shorter than buffer-beam at each end.

Manner of Application:

End footboards may be constructed in two (2) sections, provided

that practically all space on each side of coupler is filled; each section shall be not less than three (3) feet in length.

Footboards shall be securely bolted to two (2) one (1) by four (4) inches metal brackets, provided footboard is not cut or notched at any point.

If footboard is cut or notched or in two (2) sections, not less than four (4) one (1) by three (3) inches metal brackets shall be used, two (2) located on each side of coupler. Each bracket shall be securely bolted to buffer-beam, end-sill or tank-frame by not less than two (2) seven-eighths ($\frac{7}{8}$) inch bolts.

If side footboards are used, a substantial handhold or rail shall be applied not less than thirty (30) inches nor more than sixty (60) inches above tread of footboard.

Sill-steps.

Number:

Two (2) or more.

Dimensions:

Lower tread of step shall be not less than eight (8) by twelve (12) inches, metal. [May have wooden treads.]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location:

One (1) or more on each side at gangway secured to locomotive or tender.

Manner of Application:

Sill-steps shall be securely fastened with bolts or rivets.

End-handholds.

Number:

Two (2).

Dimensions:

Minimum diameter, one (1) inch, wrought iron or steel.

Minimum clearance, four (4) inches, except at coupler casting or braces, when minimum clearance shall be two (2) inches.

Location:

One (1) on pilot buffer-beam; one on rear end of tender, extending across front end of locomotive and rear end of tender. Ends of handholds shall be not more than six (6) inches from ends of buffer-beam or end-sill, securely fastened at ends.

Manner of Application:

End-handholds shall be securely fastened with bolts or rivets.

Side-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Clear length equal to approximate height of tank.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Vertical. One (1) on each side of tender near front corner; one (1) on each side of locomotive at gangway.

Manner of Application:

Side-handholds shall be securely fastened with bolts or rivets.

Uncoupling-levers.**Number:**

Two (2) double levers, operative from either side.

Dimensions:

Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

482g Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender, with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location:

One (1) on rear end of tender and one (1) on front end of locomotive.

Handrails and Steps for Headlights.

Switching-locomotives with sloping tenders with manhole or headlight located on sloping portion of tender shall be equipped with secure steps and handrail or with platform and handrail leading to such manhole or headlight.

End-ladder Clearance.

No part of locomotive or tender except draft-rigging, coupler and attachments, safety-chains, buffer-block, foot-board, brake-pipe, signal-pipe, steam-heat pipe or center arm of uncoupling-lever shall extend to within fourteen (14) inches of a vertical plane passing through the inside face of knuckle when closed with horn of coupler against buffer-block or end-sill.

Couplers.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

*Specifications Common to All Steam Locomotives.***Hand-brakes.**

Hand-brakes will not be required on locomotives nor on tenders when attached to locomotives.

If tenders are detached from locomotives and used in special service, they shall be equipped with efficient hand-brakes.

Running-boards.**Number:**

Two (2).

Dimensions:

Not less than ten (10) inches wide. If of wood, not less than one and one-half ($1\frac{1}{2}$) inches in thickness; if of metal, not less than three-sixteenths ($3/16$) of an inch, properly supported.

Location:

One (1) on each side of boiler extending from cab to front end near pilot-beam. [Running-boards may be in sections. Flat-top steam-chests may form section of running-board.]

Manner of Application:

Running boards shall be securely fastened with bolts, rivets or studs.

Locomotives having Wootten type boilers with cab located on top of boiler more than twelve (12) inches forward from boiler-head shall have suitable running-boards running from cab to rear of locomotive, with handrailings not less than twenty (20) nor more than forty-eight (48) inches above outside edge of running-boards, securely fastened with bolts, rivets or studs.

Handrails.**Number:**

Two (2) or more.

Dimensions:

Not less than one (1) inch in diameter, wrought iron or steel.

Location:

One on each side of boiler extending from near cab to near front end of boiler, and extending across front end of boiler, not less than twenty-four (24) nor more than sixty-six (66) inches above running-board.

Manner of Application:

Handholds shall be securely fastened to boiler.

Tenders of Vanderbilt Type.

Tenders known as the Vanderbilt type shall be equipped with running-boards; one (1) on each side of tender not less than ten (10) inches in width and one on top of tender not less than forty-eight (48) inches in width, extending from coal space to rear of tender.

There shall be a handrail on each side of top running-board not less than one (1) inch in diameter and not less than twenty (20) inches in height above running-board from coal space to manhole and not less than twelve (12) inches high from manhole to rear of tender.

Ladders shall be applied at forward ends of side running-boards.

Handrails and Steps for Headlights.

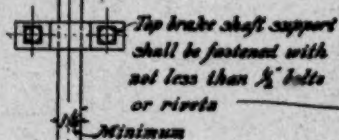
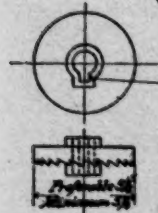
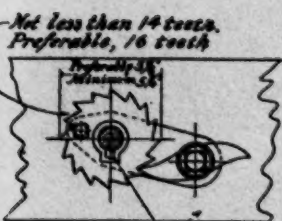
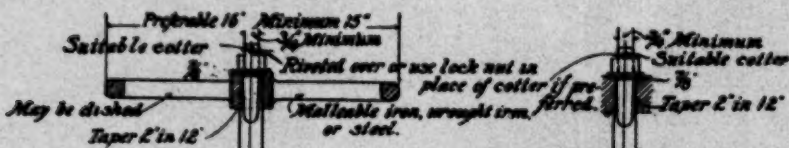
Locomotives having headlights which can not be safely and conveniently reached from pilot-beam or steam-chests shall be equipped with secure handholds and steps suitable for the use of men in getting to and from such headlights.

A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight (48) inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets.

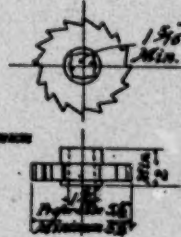
Couplers.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

(Here follow diagrams marked page 482r.)



Brake shaft without weld



Brake pawl shall be pivoted upon a 3/8" bolt or rivet, or upon a transverse secured by not less than 1/2" bolt or rivet

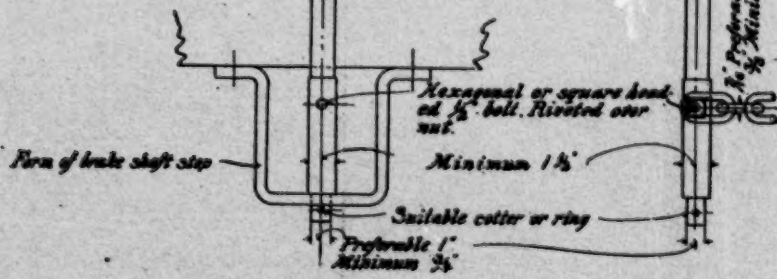
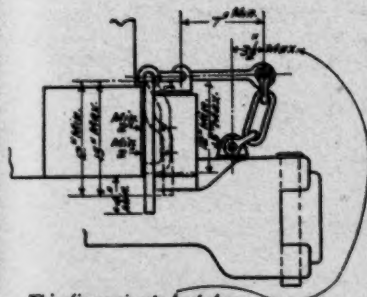
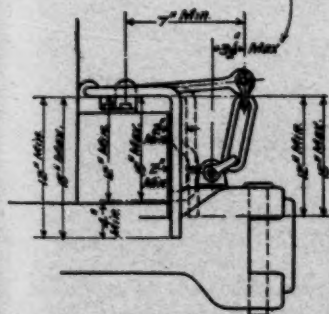


PLATE A



This dimension to be taken when horn of coupler is against buffer block or end sill, and if slotted bracket is used when rod is in extreme forward position in bracket.

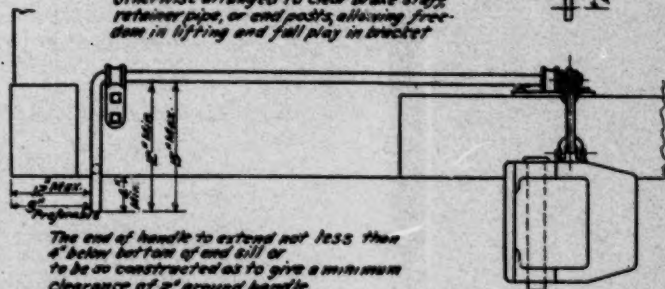
Application to concealed endsill cars



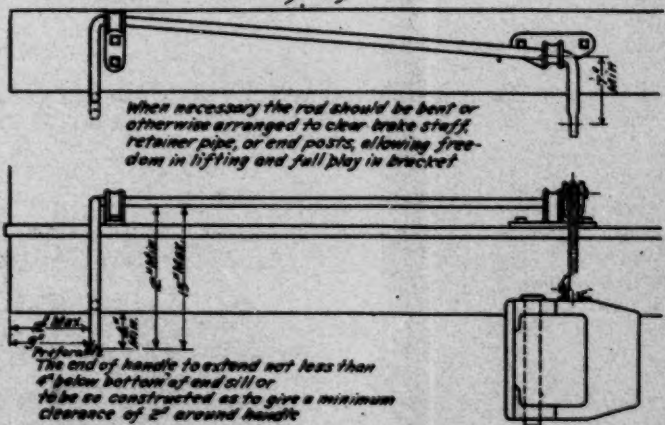
Application to outside endsill cars

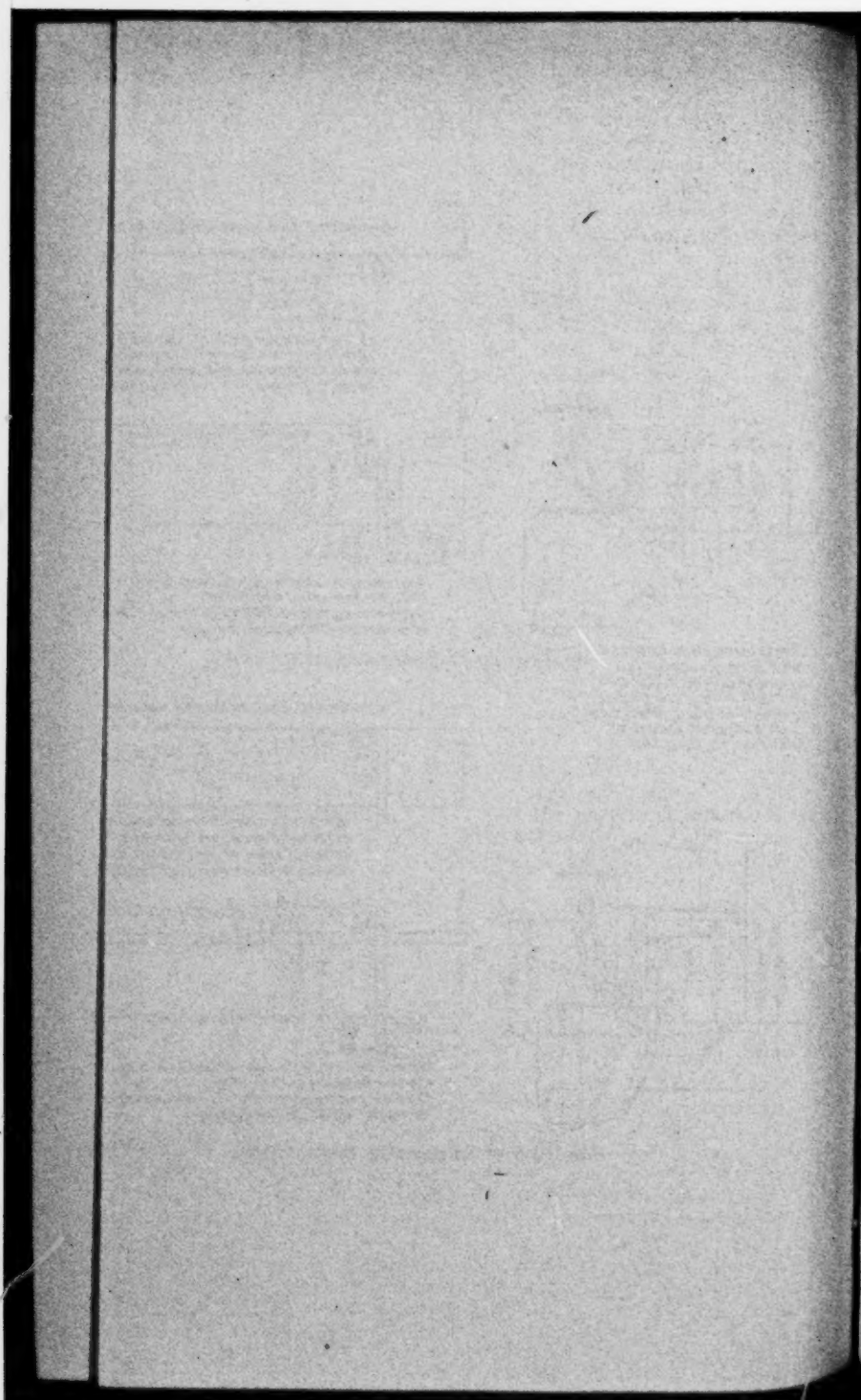


When necessary the rod should be bent or otherwise arranged to clear brake staff, retainer pipe, or end posts, allowing freedom in lifting and full play in bracket.



Graduated lock castings may be used.





482a Cars of construction not covered specifically in the foregoing sections, relative to handholds, sill-steps, ladders, hand-brakes and running-boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sill-steps, ladders, hand-brakes and running-boards as are required for cars of the nearest approximate type.

"Right" or "Left" refers to side of person when facing end or side of car from ground.

To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of five (5) per cent below size given is permitted.

And it is further ordered, That a copy of this order be at once served on all common carriers, subject to the provisions of said act, in a sealed envelope by registered mail.

By the Commission:

EDWARD A. MOSELEY, *Secretary*.

A true copy.

EDW. A. MOSELEY, *Secretary*.

483 Before the Interstate Commerce Commission.

United States Safety-appliance Standards.

October 13, 1911.

Order of the Commission.

483a

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 13th Day of March, A. D. 1911.

Present:

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer. Commissioners.

In the Matter of Designating the Number, Dimensions, Location, and Manner of Application of Certain Safety Appliances.

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number,

dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29th and 30th and October 7th, 1910, respectively, and February 27th, 1911;

Now, therefore, in pursuance of and in accordance with the provisions of said section three of said act, and superseding the Commission's order of October 13, 1900, relative thereto.

It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:

Box and Other House Cars.

Hand-brakes.

Number:

Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions:

The brake-shaft shall be not less than one and one-fourth ($1\frac{1}{4}$) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16), inches in diameter, of malleable iron, wrought iron or steel.

Location:

The hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application:

There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

483b Top brake-shaft support shall be fastened with not less than one half ($\frac{1}{2}$) inch bolts or rivets. (See Plate A.)

A brake-shaft step shall support the lower end of brake-shaft. A brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred. (See Plate A.)

Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths ($\frac{7}{8}$) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-chain shall be of not less than three-eighths ($\frac{3}{8}$), preferably seven-sixteenths ($\frac{7}{16}$), inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenths ($\frac{7}{16}$), preferably one-half ($\frac{1}{2}$), inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half ($\frac{1}{2}$) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.)

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths ($\frac{3}{4}$), preferably one (1), inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring. (See Plate A.)

Brake-shaft drum shall be not less than one and one-half ($1\frac{1}{2}$) inches in diameter. (See Plate A.)

Brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square fit shall be not less than one and five-sixteenths ($1\frac{5}{16}$) inches square. When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth ($5\frac{1}{4}$), preferably five and one-half ($5\frac{1}{2}$), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth. (See Plate A.)

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five-eighths ($\frac{5}{8}$) of an inch in diameter, or upon a trunnion secured by not less than one-half ($\frac{1}{2}$) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths ($\frac{3}{4}$) of an inch in diameter; said nut shall be secured by riveting over or by the use of a lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square fit for brake-shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-step.

If brake-step is used, it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Manner of Application:

Brake-step shall be supported by not less than two metal braces having a minimum cross-sectional area three-eighths ($\frac{3}{8}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, which shall be securely fastened to body of car with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Running-boards.

Number:

One (1) longitudinal running-board.
On outside-metal-roof cars two (2) latitudinal extensions.

Dimensions:

Longitudinal running-board shall be not less than eighteen (18), preferably twenty (20), inches in width.
Latitudinal extensions shall be not less than twenty-four (24) inches in width.

Location:

Full length of car, center of roof.

On outside-metal-roof cars there shall be two (2) latitudinal extensions from longitudinal running-board to ladder locations, except on refrigerator cars where such latitudinal extensions cannot be applied on account of ice hatches.

Manner of Application:

Running-boards shall be continuous from end to end and not cut or hinged at any point: Provided, That the length and width of running-boards may be made up of a number of pieces securely fastened to saddle-blocks with screws or bolts.

The ends of longitudinal running-board shall be not less than six (6) nor more than ten (10) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill;

and if more than four (4) inches from edge of roof of car, shall be securely supported their full width by substantial metal braces.

Running-boards shall be made of wood and securely fastened to car.

Sill-steps.

Number:

Four (4).

Dimensions:

Minimum cross-sectional area one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum clear depth, eight (8) inches.

483c Location:

One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Sill-steps exceeding twenty-one (21) inches in depth shall have an additional tread.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Ladders.

Number:

Four (4).

Dimensions:

Minimum clear length of tread: Side ladders sixteen (16) inches; end ladders fourteen (14) inches.

Maximum spacing between ladder-treads, nineteen (19) inches.

Top ladder-tread shall be located not less than twelve (12) nor more than eighteen (18) inches from roof at eaves.

Spacing of side ladder treads shall be uniform, within a limit of two (2) inches from top ladder tread to bottom tread of ladder.

Maximum distance from bottom tread of side ladder to top tread of sill step, twenty-one (21) inches.

End ladder treads shall be spaced to coincide with treads of side ladders, a variation of two (2) inches being allowed. Where construction of car will not permit the application of a tread of end

ladder to coincide with bottom tread of side ladder, the bottom tread of end ladder must coincide with second tread from bottom of side ladder.

Hard-wood treads, minimum dimensions one and one-half ($1\frac{1}{2}$) by two (2) inches.

Iron or steel treads, minimum diameter five-eighths ($\frac{5}{8}$) of an inch.

Minimum clearance of treads, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) on each side, not more than eight (8) inches from right end of car; one (1) on each end, not more than eight (8) inches from left side of car; measured from inside edge of ladder-stile or clearance of ladder treads to corner of car.

Manner of Application:

Metal ladders without stiles near corners of cars shall have foot guards or upward projections not less than two (2) inches in height near inside end of bottom treads.

Stiles of ladders, projecting two (2) or more inches from face of car, will serve as foot-guards.

Ladders shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets. Three-eighths ($\frac{3}{8}$) inch bolts may be used for wooden treads which are gained into stiles.

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Roof-handholds.

Number:

One (1) over each ladder.

One (1) right-angle handhold may take the place of two (2) adjacent specified roof-handholds, provided the dimensions and locations coincide, and that an extra leg is securely fastened to car at point of angle.

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

On roof of car: One (1) parallel to treads of each ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof, except on refrigerator cars where ice hatches prevent, when location may be nearer edge of roof.

Manner of Application:

Roof-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.**Number:**

Four (4).

[Tread of side-ladder is a side-handhold.]

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, except as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Side-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

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Horizontal End-handholds.**Number:**

Eight (8) or more. (Four (4) on each end of car.)

[Tread of end-ladder is an end-handhold.]

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

A handhold fourteen (14) inches in length may be used when it is impossible to use one sixteen (16) inches in length.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$) inches.

Location:

One (1) near each side on each end of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, except as provided above, when tread of end-ladder is an end-handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill or sheathing over end-sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

On each end of cars with platform end-sills six (6) or more inches in width, measured from end-post or siding and extending entirely across end of car, there shall be one additional end-handhold not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application:

Horizontal end-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Vertical End-handholds.

Number:

Two (2) on full-width platform end-sill cars, as heretofore described.

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, eighteen (18), preferably twenty-four (24), inches.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$) inches.

Location:

One (1) on each end of car opposite ladder, not more than eight (8) inches from side of car; clearance of bottom end of handhold shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

Manner of Application:

Vertical end-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Uncoupling-levers.

Number:

Two (2).

Uncoupling-levers may be either single or double, and of any efficient design.

Dimensions:

Handles of uncoupling-levers, except those shown on Plate B or of similar designs, shall be not more than six (6) inches from sides of car.

Uncoupling-levers of design shown on Plate B and of similar designs shall conform to the following-prescribed limits:

Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift-arms shall be not less than seven (7) inches long.

Center of eye at end of center lift-arm shall be not more than three and one-half ($3\frac{1}{2}$) inches beyond center of eye of uncoupling-pin of coupler when horn of coupler is against the buffer-block or end-sill. (See Plate B.)

Ends of handles shall extend not less than four (4) inches below bottom of end-sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See Plate B.)

Handles of uncoupling-levers of the "rocking" or "push-down" type shall be not less than eighteen (18) inches from top of rail when lock-block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

Location:

One (1) on each end of car.

When single lever is used it shall be placed on left side of end of car.

Hopper Cars and High-side Gondolas with Fixed Ends.

[Cars with sides more than thirty-six (36) inches above the floor are high-side cars.]

Hand-Brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of, and not more than twenty-two (22) inches from, center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

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Sill-Steps.

Same as specified for "Box and other house cars."

Ladders.**Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars," except that top ladder-tread shall be located not more than four (4) inches from top of car.

Location:

Same as specified for "Box and other house cars."

Manner of Application:

Same as specified for "Box and other house cars."

Side-handholds.

Same as specified for "Box and other house cars."

Horizontal End-handholds.

Same as specified for "Box and other house cars."

Vertical End-handholds.

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel, brake-step or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Drop-end High-side Gondola Cars.

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

Ladders.

Number:

Two (2).

Dimensions:

Same as specified for "Box and other house cars," except that top ladder-tread shall be located not more than four (4) inches from top of car.

Location:

One (1) on each side, not more than eight (8) inches from right end of car, measured from inside edge of ladder-stile or clearance of ladder-treads to corner of car.

Manner of Application:

Same as specified for "Box and other house cars."

Side-handholds.

Same as specified for "Box and other house cars."

Horizontal End-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel or uncoupling lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block of end-sill, and no other part of end of car fixtures on same above said sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Fixed-end Low-side Gondola and Low-side Hopper Cars.

[Cars with sides thirty-six (36) inches or less above the floor are low-side cars.]

Hand-brakes.**Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not more than twenty-two (22) inches from center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

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Side-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

Horizontal End-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each side on each end of car not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-step, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

*Drop-end Low-side Gondola Cars.***Hand-brakes.****Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars," provided that top brake shaft support may be omitted.

Sill-steps.

Same as specified for "Box and other house cars."

Side-handholds.**Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

End-handholds.**Number:**

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Flat Cars.

[Cars with sides twelve (12) inches or less above the floor may be equipped the same as flat cars.]

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on the end of car to the left of center, or on side of car not more than thirty-six (36) inches from right-hand end thereof.

483g Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

Side-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end.

Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

End-Handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

Tank-cars with Side-platforms.

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

Side-handholds.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands, four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of Application:

Same as specified for "Box and other house cars."

End-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Tank-head Handholds.

Number:

Two (2). [Not required if safety-railing runs around ends of tank.]

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel. Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Location:

Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application:

Tank-head handholds shall be securely fastened.

Safety-railings.

Number:

One (1) continuous safety-railing running around sides and ends of tank, securely fastened to tank or tank-bands at ends and sides of tank; or two (2) running full length of tank at sides of car supported by posts.

Dimensions:

Not less than three-fourths ($\frac{3}{4}$) of an inch, iron.

Location:

Running full length of tank either at side supported by posts or securely fastened to tank or tank-bands, not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application:

Safety-railings shall be securely fastened to tank-body, tank-bands or posts.

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

483h Tank Cars Without Side-sills and Tank Cars with Short Side-sills and End-platforms.

Hand-brakes.**Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Running-boards.**Number:**

One (1) continuous running-board around sides and ends; or two (2) running full length of tank, one (1) on each side.

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application:

If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-top.

Running-boards shall be securely fastened to tank or tank-bands.

Sill-steps.**Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side under side-handhold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Same as specified for "Box and other house cars."

Ladders.

[If running-boards are so located as to make ladders necessary.]

Number:

Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

Dimensions:

Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half (1½) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths (⅝) of an inch.

Minimum clearance, two (2), preferably two and one-half (2½), inches.

Location:

On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

Manner of Application:

Ladders shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Side-handholds.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of Application:

Same as specified for "Box and other house cars."

End-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Same as specified for "Box and other house cars."

Tank-head Handholds.

Number:

Two (2). [Not required if safety-railing runs around ends of tank.]

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

183i Location:

Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Manner of Application:

Tank-head handholds shall be securely fastened.

Safety-railings.

Number:

One (1) running around sides and ends of tank or two (2) running full length of tank.

Dimensions:

Minimum diameter, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two and one-half ($2\frac{1}{2}$) inches.

Location:

Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

Manner of Application:

Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

Uncoupling-levers.

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-rod against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein stated, shall extend beyond the outer face of buffer-block.

Tank Cars Without End-sills.

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

Running-boards.**Number:**

One (1).

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of tank.

Manner of Application:

If running-boards are applied below center of tank, outside ends of running boards shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or brake stop.

Running-boards shall be securely fastened to tank or tank-bar.

Sill-steps.**Number:**

Four (4). [If tank has high running-boards, making ladder unnecessary, sill-steps must meet ladder requirements.]

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over or with one-half (½) inch rivets.

Side-handholds.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car over sill-step, on running-board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

Manner of Application:

Same as specified for "Box and other house cars."

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End-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side on each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line or coupler.

Manner of Application:

Same as specified for "Box and other house cars."

Safety-railings.

Number:

One (1).

Dimensions:

Minimum diameter seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Minimum clearance two and one-half ($2\frac{1}{2}$) inches.

Location:

Safety-railings shall be continuous around sides and ends of car,

not less than thirty (30) nor more than sixty (60) inches above running-boards.

Manner of Application:

Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

Uncoupling-levers.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars," except that minimum length of uncoupling-lever shall be forty-two (42) inches measured from center line of end of car to handle of lever.

Location:

Same as specified for "Box and other house cars," except that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

End-ladder Clearance.

No part of car above buffer-block within thirty (30) inches from side of car, except brake-shaft, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than exceptions herein noted, shall extend beyond the face of buffer-block.

Caboose Cars with Platforms.

Hand-brakes.

Number:

Each caboose car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars with platforms shall be located on platform to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Running-boards.

Number:

One (1) longitudinal running-board.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Full length of car, center of roof. [On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

Manner of Application:

Same as specified for "Box and other house cars."

Ladders.

Number:

Two (2).

Dimensions:

None specified.

Location:

One (1) on each end.

Manner of Application:

Same as specified for "Box and other house cars."

Roof-handholds.

Number:

One (1) over each ladder.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Dimensions:

Same as specified for "Box and other house cars."

Location:

On roof of caboose, in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Manner of Application:

Same as specified for "Box and other house cars."

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Cupola-handholds.

Number:

One (1) or more.

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) continuous handhold extending around top of cupola not more than three (3) inches from edge of cupola-roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

Manner of Application:

Cupola-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside and riveted over or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.**Number:**

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, thirty-six (36) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) near each end on each side of car, curving downward toward center of car from a point not less than thirty (30) inches above platform to a point not more than eight (8) inches from bottom of car. Top end of handhold shall be not more than eight (8) inches from outside face of end-sheathing.

Manner of Application:

Same as specified for "Box and other house cars."

End-handholds.**Number:**

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side on each end of car on face of platform end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of platform end-sill.

Manner of Application:

Same as specified for "Box and other house cars."

End Platform-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) right-angle handhold on each side of each end extending horizontally from door-post to corner of car at approximate height of platform-rail, then downward to within twelve (12) inches of bottom of car.

Manner of Application:

Handholds shall be securely fastened with bolts, screws, or rivets.

Caboose Platform-steps.

Safe and suitable box steps leading to caboose platforms shall be provided at each corner of caboose.

Lower tread of step shall be not more than twenty-four (24) inches above top of rail.

Uncoupling-levers.

Same as specified for "Box and other house cars."

Caboose Cars Without Platforms.

Hand-brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars without platforms shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

Brake-step.

Same as specified for "Box and other house cars."

Running-boards.**Number:**

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Full length of car, center of roof. [On caboose cars with cupolas longitudinal running-boards shall extend from cupola to ends of roof.]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

Manner of Application:

Same as specified for "Box and other house cars."

Sill-steps.

Same as specified for "Box and other house cars."

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Side-door Steps.**Number:**

Two (2) [if caboose has side-doors].

Dimensions:

Minimum length, five (5) feet.

Minimum width, six (6) inches.

Minimum thickness of tread, one and one-half ($1\frac{1}{2}$) inches.

Minimum height of back-stop, three (3) inches.

Maximum height from top of rail to top of tread, twenty-four (24) inches.

Location:

One (1) under each side-door.

Manner of Application:

Side-door steps shall be supported by two (2) iron brackets having a minimum cross-sectional area seven-eighths ($\frac{7}{8}$) by three (3) inches or equivalent, each of which shall be securely fastened to car by not less than two (2) three-fourth ($\frac{3}{4}$) inch bolts.

Ladders.**Number:**

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Same as specified for "Box and other house cars" except when caboose has side doors, then side-ladders shall be located not more than eight (8) inches from doors.

Manner of Application:

Same as specified for "Box and other house cars."

End-ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Roof-handholds.**Number:**

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) over each ladder, on roof in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Manner of Application:

Roof-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Cupola-handholds.**Number:**

One (1) or more.

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) continuous cupola-handhold extending around top of cupola, not more than three (3) inches from edge of cupola roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

Manner of Application:

Cupola-handhold shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside and riveted over or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application:

Same as specified for "Box and other house cars."

Side-door Handholds.

Number:

Four (4): Two (2) curved, two (2) straight.

Dimensions:

Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) curved handhold, from a point at side of each door opposite ladder, not less than thirty-six (36) inches above bottom of car, curving away from door downward to a point not more than six (6) inches above bottom of car.

One (1) vertical handhold at ladder side of each door from a point not less than thirty-six (36) inches above bottom of car to a point not more than six (6) inches above level of bottom of door.

Manner of Application:

Side-door handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

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Horizontal End-handholds.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Same as specified for "Box and other house cars," except that one (1) additional end-handhold shall be on each end of cars with platform end-sills as heretofore described, unless car has door in center of end. Said handhold shall be not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application:

Same as specified for "Box and other house cars."

Vertical End-handholds.

Same as specified for "Box and other house cars."

Uncoupling-levers.

Same as specified for "Box and other house cars."

Passenger-train Cars With Wide Vestibules.

Hand-brakes.

Number:

Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

Side-handholds.

Number:

Eight (8).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, metal.

Minimum clear length, sixteen (16) inches.

Minimum clearance, one and one-fourth ($1\frac{1}{4}$), preferably one and one-half ($1\frac{1}{2}$), inches.

Location:

Vertical: One (1) on each vestibule door post.

Manner of Application:

Side-handholds shall be securely fastened with bolts, rivets or screws.

End-handholds.**Number:**

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2) preferably two and one-half ($2\frac{1}{2}$), inches.

Handholds shall be flush with or project not more than one (1) inch beyond vestibule face.

Location:

Horizontal: One (1) near each side on each end projecting downward from face of vestibule end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

End-handholds shall be securely fastened with bolts or rivets.

When marker-sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

Uncoupling-levers.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

Passenger-train Cars With Open End-platforms.**Hand-brakes.****Number:**

Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

End-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

Location:

Horizontal: One (1) near each side of each end on face of platform end-sill, projecting downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of end-sill.

Manner of Application:

End-handholds shall be securely fastened with bolts or rivets.

End Platform-handholds.

Number:

Four (4). [Cars equipped with safety-gates do not require end platform-handholds.]

Dimensions:

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches, metal.

Location:

Horizontal from or near door-post to a point not more than twelve (12) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform. Horizontal portion shall be not less than twenty-four (24) inches in length nor more than forty (40) inches above platform.

483n Manner of Application:

End platform-handholds shall be securely fastened with bolts, rivets, or screws.

Uncoupling-levers.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

*Passenger-train Cars Without End-platforms.***Hand-brakes.****Number:**

Each passenger-train car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

Sill-steps.**Number:**

Four (4).

Dimensions:

Minimum length of tread ten (10), preferably twelve (12), inches.

Minimum cross-sectional area one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, wrought iron or steel.

Minimum clear depth eight (8) inches.

Location:

One (1) near each end on each side not more than twenty-four (24) inches from corner of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than two (2) inches inside of face of side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Side-handholds.**Number:**

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16), preferably twenty-four (24), inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal or vertical: One (1) near each end on each side of car over sill-step.

If horizontal, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

If vertical, lower end not less than eighteen (18) nor more than twenty-four (24) inches above center line of coupler.

Manner of Application:

Side-handholds shall be securely fastened with bolts, rivets or screws.

End-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal: One (1) near each side on each end projecting downward from face of end-sill or sheathing. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application:

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

End-handholds shall be securely fastened with bolts or rivets.

When marker sockets or brackets are located so that they can not be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

End-handrails: [On cars with projecting end-sills.]

Number:

Four (4).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

One (1) on each side of each end, extending horizontally from door-post or vestibule-frame to a point not more than six (6) inches from corner of car, then approximately vertical to a point not more

than six (6) inches from top of platform end-sill; horizontal portion shall be not less than thirty (30) nor more than — (60) inches above platform end-sill.

Manner of Application:

End hand-rails shall be securely fastened with bolts, rivets or screws.

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Side-door Steps.

Number:

One (1) under each door.

Dimensions:

Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum cross-sectional area, one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, wrought iron or steel.

Minimum clear depth, eight (8) inches.

Location:

Outside edge of tread of step not more than two (2) inches inside of face of side of car.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Side-door steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

A vertical handhold not less than twenty-four (24) inches in clear length shall be applied above each side-door step on door-post.

Uncoupling-levers.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachment shall be so applied that the coupler can be operated from the left side of car.

Steam Locomotives Used in Road Service.

Tender sill-steps.

Number:

Four (4) on tender.

Dimensions:

Bottom tread not less than eight (8) by twelve (12) inches, metal.

[May have wooden treads.]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location:

One (1) near each corner of tender on sides.

Manner of Application:

Tender sill-steps shall be securely fastened with bolts or rivets.

Pilot Sill-steps.**Number:**

Two (2).

Dimensions:

Tread not less than eight (8) inches in width by ten (10) inches in length, metal.

[May have wooden treads.]

Location:

One (1) on or near each end of buffer-beam outside of rail and not more than sixteen (16) inches above rail.

Manner of Application:

Pilot sill-steps shall be securely fastened with bolts or rivets.

Pilot-beam Handholds.**Number:**

Two (2).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14), preferably sixteen (16), inches.

Minimum clearance, two and one-half ($2\frac{1}{2}$) inches.

Location:

One (1) on each end of buffer-beam.

[If uncoupling-lever extends across front end of locomotives to within eight (8) inches of end of buffer-beam, and is seven-eighths ($\frac{7}{8}$) of an inch or more in diameter, securely fastened, with a clearance of two and one-half ($2\frac{1}{2}$) inches, it is a handhold.]

Manner of Application:

Pilot-beam handholds shall be securely fastened with bolts or rivets.

Side-handholds.

Number:

Six (6).

Dimensions:

Minimum diameter, if horizontal, five-eighths ($\frac{5}{8}$) of an inch; if vertical, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Horizontal, minimum clear length, sixteen (16) inches.

Vertical, clear length equal to approximate height of tank.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Horizontal or vertical: If vertical, one (1) on each side of tender within six (6) inches of rear or on corner, if horizontal, same as specified for "Box and other house cars."

One (1) on each side of tender near gangway; one (1) on each side of locomotive at gangway; applied vertically.

Manner of Application:

Side handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Rear-end Handholds.

Number:

Two (2).

Dimensions:

Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14) inches.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

483p Location:

Horizontal: One (1) near each side of rear end of tender on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of tender.

Manner of Application:

Rear-end handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Uncoupling-levers.

Number:

Two (2) double levers, operative from either side.

Dimensions:

Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of

tender with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location:

One (1) on rear end of tender and one (1) on front end of locomotive.

Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Manner of Application:

Uncoupling-levers shall be securely fastened with bolts or rivets.

Couplers.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Steam Locomotives Used in Switching Service.

Footboards.

Number:

Two (2) or more.

Dimensions:

Minimum width of tread, ten (10) inches, wood.

Minimum thickness of tread, one and one-half ($1\frac{1}{2}$), preferably two (2), inches.

Minimum height of back-stop, four (4) inches above tread.

Height from top of rail to top of tread, not more than twelve (12) nor less than nine (9) inches.

Location:

Ends or sides.

If on ends, they shall extend not less than eighteen (18) inches outside of gauge of straight track, and shall be not more than twelve (12) inches shorter than buffer-beam at each end.

Manner of Application:

End footboards may be constructed in two (2) sections, provided that practically all space on each side of coupler is filled; each section shall be not less than three (3) feet in length.

Footboards shall be securely bolted to two (2) one (1) by four (4) inches metal brackets, provided footboard is not cut or notched at any point.

If footboard is cut or notched or in two (2) sections, not less than four (4) one (1) by three (3) inches metal brackets shall be used, two (2) located on each side of coupler. Each bracket shall be securely bolted to buffer-beam, end-sill or tank-frame by not less than two (2) seven-eighths ($\frac{7}{8}$) inch bolts.

If side footboards are used, a substantial handhold or rail shall be applied not less than thirty (30) inches nor more than sixty (60) inches above tread of footboard.

Sill-steps.

Number:

Two (2) or more.

Dimensions:

Lower tread of step shall be not less than eight (8) by twelve (12) inches, metal. [May have wooden treads.]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location:

One (1) or more on each side at gangway secured to locomotive or tender.

Manner of Application:

Sill-steps shall be securely fastened with bolts or rivets.

End-handholds.

Number:

Two (2).

Dimensions:

Minimum diameter, one (1) inch, wrought iron or steel.

Minimum clearance, four (4) inches, except at coupler casting or braces, when minimum clearance shall be two (2) inches.

Location:

One (1) on pilot buffer-beam; one on rear end of tender, extending across front end of locomotive and rear end of tender. Ends of handholds shall be not more than six (6) inches from ends of buffer-beam or end-sill, securely fastened at ends.

Manner of Application:

End-handholds shall be securely fastened with bolts or rivets.

Side-handholds.

Number:

Four (4).

Dimensions:

Minimum diameter, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Clear length equal to approximate height of tank.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location:

Vertical. One (1) on each side of tender near front corner; one (1) on each side of locomotive at gangway.

Manner of Application:

Side-handholds shall be securely fastened with bolts or rivets.

Uncoupling-levers.**Number:**

Two (2) double levers, operative from either side.

Dimensions:

Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

483q. Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender, with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location:

One (1) on rear end of tender and one (1) on front end of locomotive.

Handrails and Steps for Headlights.

Switching-locomotives with sloping tenders with manhole or headlight located on sloping portion of tender shall be equipped with secure steps and handrail or with platform and handrail leading to such manhole or headlight.

End-ladder Clearance.

No part of locomotive or tender except draft-rigging, coupler and attachments, safety-chains, buffer-block, foot-board, brake-pipe, signal-pipe, steam-heat pipe or arms of uncoupling-lever shall extend to within fourteen (14) inches of a vertical plane passing through the inside face of knuckle when closed with horn of coupler against buffer-block or end-sill.

Couplers.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Specifications Common to All Steam Locomotives.**Hand-brakes.**

Hand-brakes will not be required on locomotives nor on tenders when attached to locomotives.

If tenders are detached from locomotives and used in special service, they shall be equipped with efficient hand-brakes.

Running-boards.**Number:**

Two (2).

Dimensions:

Not less than ten (10) inches wide. If of wood, not less than one and one-half ($1\frac{1}{2}$) inches in thickness; if of metal, not less than three-sixteenths ($\frac{3}{16}$) of an inch, properly supported.

Location:

One (1) on each side of boiler extending from cab to front end near pilot-beam. [Running-boards may be in sections. Flat-top steam-chests may form section of running-board.]

Manner of Application:

Running boards shall be securely fastened with bolts, rivets or studs.

Locomotives having Wootten type boilers with cab located on top of boiler more than twelve (12) inches forward from boiler-head shall have suitable running-boards running from cab to rear of locomotive, with handrailings not less than twenty (20) nor more than forty-eight (48) inches above outside edge of running-boards, securely fastened with bolts, rivets or studs.

Handrails.**Number:**

Two (2) or more.

Dimensions:

Not less than one (1) inch in diameter, wrought iron or steel.

Location:

One on each side of boiler extending from near cab to near front end of boiler, and extending across front end of boiler, not less than twenty-four (24) nor more than sixty-six (66) inches above running-board.

Manner of Application:

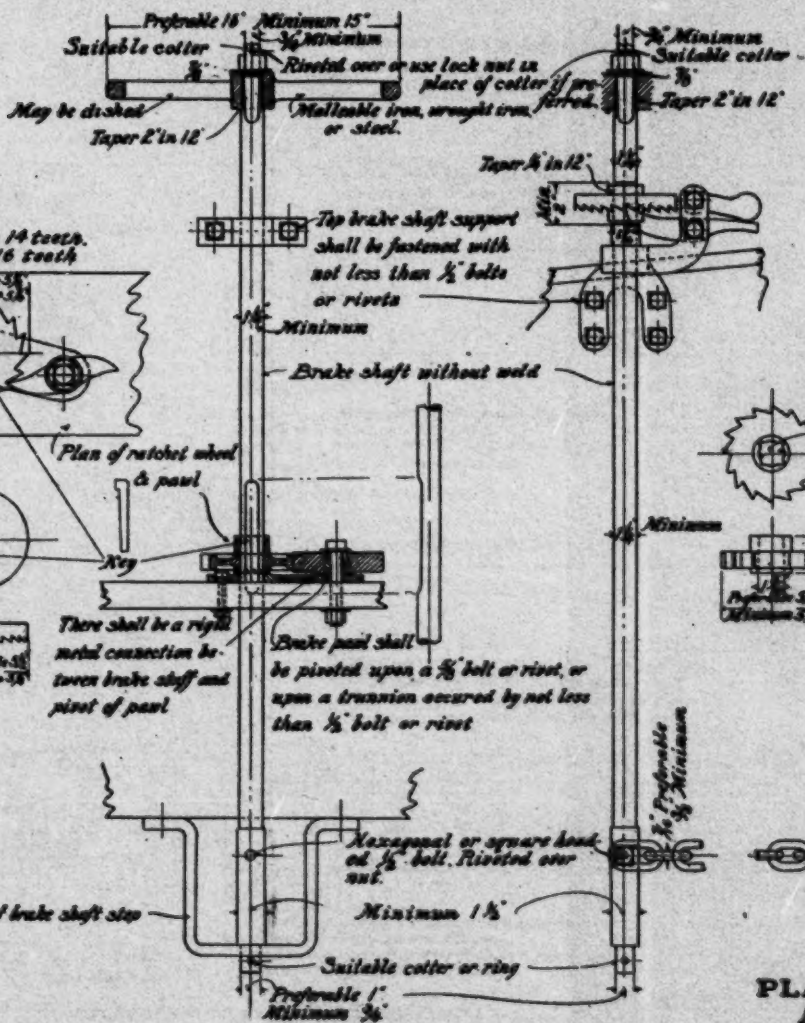
Handrails shall be securely fastened to boiler.

Tenders of Vanderbilt Type.

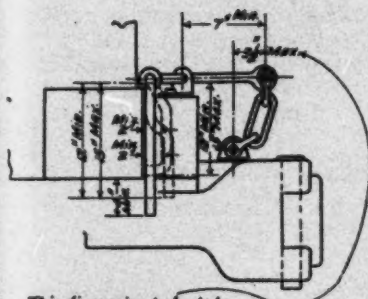
Tenders known as the Vanderbilt type shall be equipped with running-boards; one (1) on each side of tender not less than ten (10) inches in width and one on top of tender not less than forty-eight (48) inches in width, extending from coal space to rear of tender.

There shall be a handrail on each side of top running-board, extending from coal space to rear of tank, not less than one (1) inch in diameter and not less than twenty (20) inches in height above running-board from coal space to manhole.

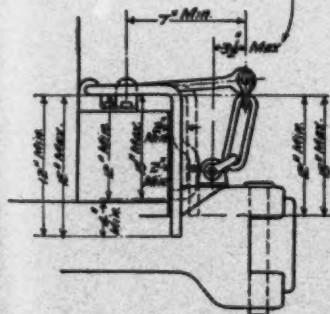
There shall be a handrail extending from coal space to within twelve (12) inches of rear of tank, attached to each side of tank



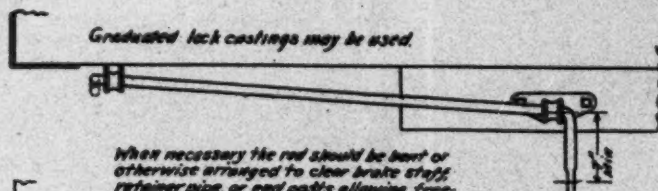
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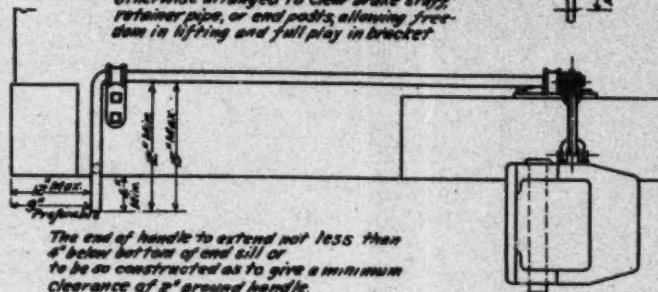
This dimension to be taken when horn of coupler is against buffer block or end sill, and, if slotted bracket is used when rod is in extreme forward position in bracket.



Application to outside endsill cars

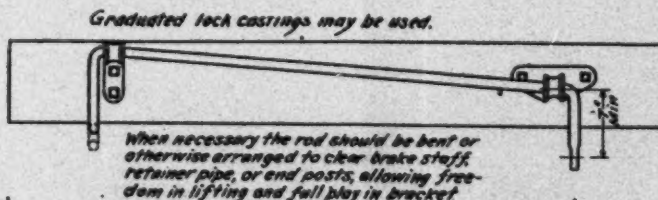


When necessary the rod should be bent or otherwise arranged to clear brake staff, retainer pipe, or end posts, allowing freedom in lifting and full play in bracket.

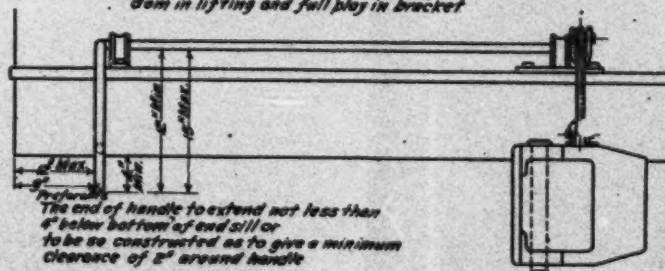


The end of handle to extend not less than 4\"/>

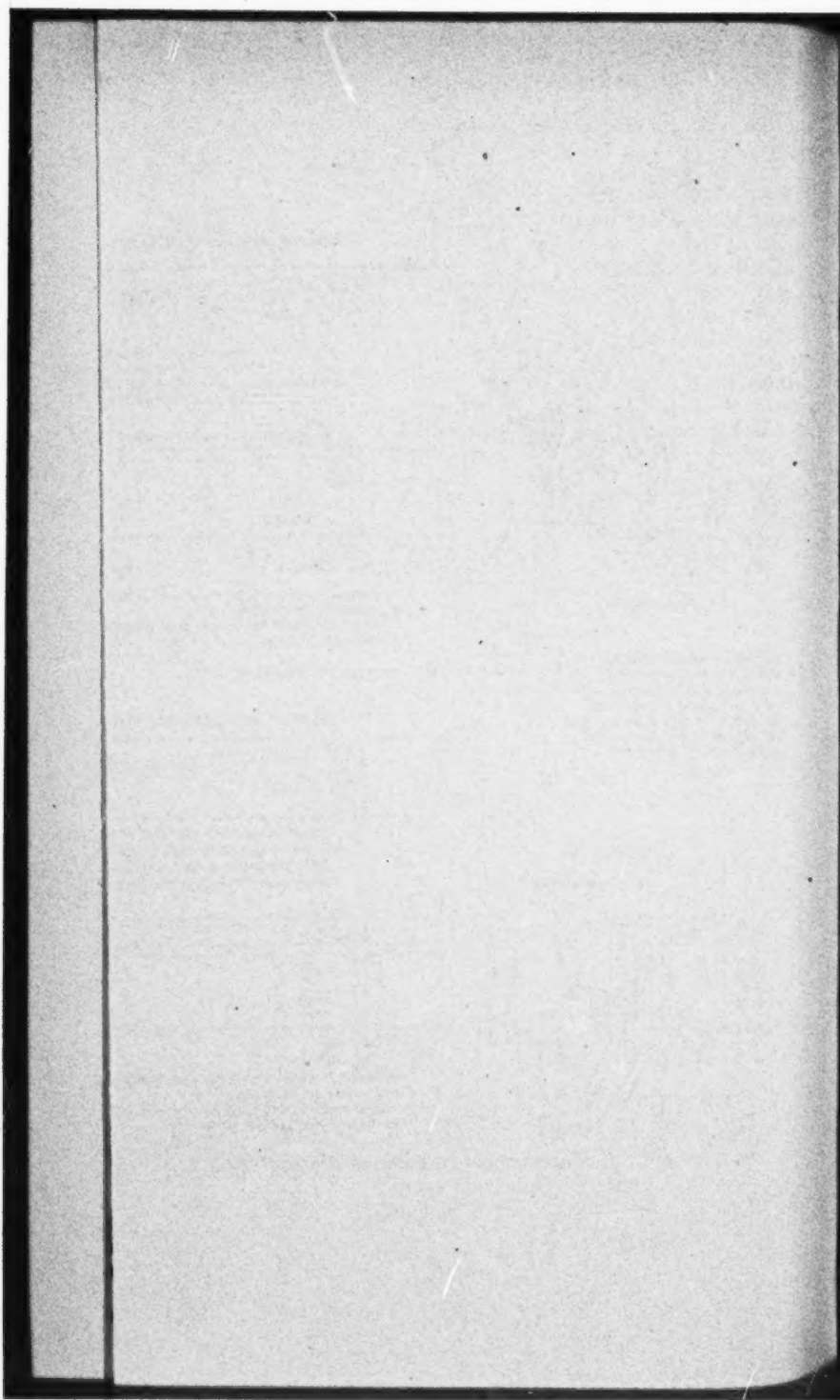
Application to concealed endsill cars



When necessary the rod should be bent or otherwise arranged to clear brake staff, retainer pipe, or end posts, allowing freedom in lifting and full play in bracket.



The end of handle to extend not less than 4\"/>



above side running-board, not less than thirty (30) nor more than sixty-six (66) inches above running board.

There shall be one (1) vertical end handhold on each side of Vanderbilt type of tender, located within eight (8) inches of rear of tank extending from within eight (8) inches of top of end-sill to within eight (8) inches of side handrail. Post supporting rear end of side running-board if not more than two (2) inches in diameter and properly located, may form section of handhold.

An additional horizontal end handhold shall be applied on rear end of all Vanderbilt type of tenders which are not equipped with vestibules. Handhold to be located not less than thirty (30) nor more than sixty-six (66) inches above top of end-sill. Clear length of handhold to be not less than forty-eight (48) inches.

Ladders shall be applied at forward ends of side running-boards.

(Here follows diagrams marked page 483r.)

483a

Handrails and Steps for Headlights.

Locomotives having headlights which can not be safely and conveniently reached from pilot-beam or steam-chests shall be equipped with secure handrails and steps suitable for the use of men in getting to and from such headlights.

A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight (48) inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets.

Couplers.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Cars of construction not covered specifically in the foregoing sections, relative to handholds, sill-steps, ladders, hand-brakes and running-boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sill-steps, ladders, hand-brakes and running-boards as are required for cars of the nearest approximate type.

"Right" or "Left" refers to side of person when facing end or side of car from ground.

To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of five (5) per cent below size given is permitted.

And it is further ordered, That a copy of this order be at once served on all common carriers, subject to the provisions of said act, in a sealed envelope by registered mail.

By the Commission:

EDWARD A. MOSELEY, *Secretary.*

A true copy.

EDW. A. MOSELEY, *Secretary.*

484

Testimony of H. Tyson.

H. TYSON, the next witness, called on behalf of the Defendant, after being duly sworn, testified as follows in response to questions propounded by Mr. McDONOUGH:

Q. Mr. Tyson, what is your business?

A. Road Master.

Q. How long have you been in railroad work of that kind?

A. For the last forty years.

Q. Were you Road Master on the Kansas City Southern in March of this year?

A. Yes, sir.

Q. Was Page and the track north and south of Page, in your jurisdiction?

A. Yes, sir.

Q. State whether or not you made an examination of that track to see what condition it was in after you heard of this accident to Mr. Old?

Judge FRAZEL: If the Court please, there is no allegation there of the condition of that track. We are not going to contend that the track was bad.

Witness Excused.

At this point the Defendant rested.

485 Plaintiff introduces the following testimony in Rebuttal.

Testimony of Jim Coulter.

JIM COULTER, called on behalf of the Plaintiff, in rebuttal, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Coulter, where do you live?

A. I live at Foreman.

Q. You were reared near here, were you not?

A. Yes, sir.

Q. Did you, this afternoon, go down on the yards in the Kansas City Southern and observe a refrigerator car with an oil tank car in front of it just below the depot on the house track?

A. Yes, sir.

Q. Did you attempt to make the passage from the side ladder you found on the refrigerator car onto the platform of the tank car?

A. Yes, sir.

Q. Did you make it?

A. Yes, sir.

Q. Did you experience any difficulty in making it?

A. Yes, sir, I had to reach over pretty far.

Q. Did you have to reach to such an extent that you would necessarily lose control of yourself if the train had been in motion?

Mr. McDONOUGH: Objected to as leading.

Court: Yes, that is leading.

Plaintiff excepted to the ruling of the Court.

486 Q. In your opinion, could you have made that passage safely if the train had been in motion?

Mr. McDONOUGH: Objected to because the competency of the witness is not shown.

Court: I don't think he would be hardly competent to give an opinion. He is not a brakeman. I expect Mr. Coulter's testimony had better be confined as it appeared there to him this evening, the distance and difficulty, etc.

Plaintiff excepted to the ruling of the Court.

A. Now then, did you also make an effort, standing with your foot on the lower grab iron to step onto the platform and catch the rail I mean on the end?

A. That bar of iron down on the end of the car?

Q. Yes, sir?

A. I just stepped over it.

Q. You could make that reach without any difficulty?

A. Yes, sir.

Cross-examination.

Questions by Mr. McDONOUGH:

— Did you get on top of the refrigerator car?

A. No, sir.

Witness Excused.

487

Testimony of Mrs. Leslie Old.

Mrs. LESLIE OLD, the next witness called on behalf of the Plaintiff, in rebuttal, after being duly sworn, testified as follows in response to questions propounded by Judge FEAZEL:

Q. Mrs. Old, do you recognize that little bottle of whiakey?

A. Yes, sir.

Q. Was that the bottle that was turned over to you purporting to be in the possession of your husband when he was killed?

A. Yes, sir.

Q. Where has that been since that time? It has been in your possession?

A. Yes, sir.

Q. Is that just like it was when it was turned over to you?

A. Just like it was when it was turned over to me.

Judge FEAZEL: Now, I offer it in testimony.
It is here introduced.

Witness Excused.

488

Testimony of R. L. Bailey.

R. L. BAILEY, the next witness called on behalf of the Plaintiff, in rebuttal, after being duly sworn, testified as follows in response to questions propounded by Judge FEAZEL:

Q. Now, Mr. Bailey, you testified the other day, that you got on the train that Leslie Old was killed with at Rich Mountain I believe, did you?

A. Yes, sir.

Q. And you were on that train up to Heavener where you left the train?

A. Yes, sir.

Q. Did you ride with Leslie Old or in company with Leslie Old during any part of that distance?

A. Yes, sir, I did.

Q. Where did you get with him or where did he get with you, and how far did you ride?

A. Well, I rode with him from Rich Mountain to Page.

Q. Were you riding together all the time?

A. No, sir, the train was stopped some; we wasn't together.

Q. Were you close to him during the time you were together?

A. Well, we were sitting right side by side on a car of lumber.

Q. Did you smell any whiskey on his breath that afternoon?

A. No, sir.

Q. Did you observe anything in his conduct, either in words or his actions to indicate that he had drunk anything?

Mr. McDONOUGH: Objected to as leading.

Court: Go ahead.

Defendant excepted to the ruling of the Court.

489 A. No, sir.

Q. You had a bottle of whiskey with you, didn't you?

A. Yes, sir.

Q. Did you offer him whiskey, offer him a drink of whiskey, more than one drink or any at all?

Mr. McDONOUGH: Objected to as not in rebuttal.

Court: Go ahead.

Defendant excepted to the ruling of the Court.

A. Yes, sir.

Q. Did he drink it?

A. No, sir, he didn't.

Q. Did he tell you why?

Mr. McDONOUGH: Objected to.

Court: Don't answer that.

Plaintiff excepted to the ruling of the Court.

Q. Did you give him a little bottle of whiskey?

A. I gave him some in a bottle, yes, sir.

Q. For what purpose?

Mr. McDONOUGH: Objected to.

Court: He could tell what his motive was. He couldn't tell what Mr. Old intended to do with it. He may tell why he gave it to him.

Mr. McDONOUGH: I except to the Court's ruling.

Judge FEAZEL: It strikes me, in a case of this kind it would be permissible to explain the motive of his getting it as tending to explain the motive.

Court: That would be hearsay testimony.

Plaintiff excepted to the ruling of the Court.

490 Q. What was your motive in giving it to him?

A. Why, to take it home with him.

Q. Will you please examine this little bottle, and state whether or not that was the bottle you gave him?

A. That looks like the bottle.

Q. After the whiskey was poured in the bottle, did you see it?

A. Yes, sir.

Q. Did you fill the bottle?

A. I filled it, well, something like that bottle there. He held it up and says "that's enough". He held it up to the light that way

Mr. McDONOUGH: I move to exclude that statement.

Court: Yes, that statement he held it up to the light is excluded.

Q. You didn't pour any more than is there now?

A. No, sir.

Q. How did you get that whiskey from your bottle into that?

A. He held his hand like that and poured it in that way.

Q. Made a funnel out of his hand?

A. Yes, sir.

Q. Did you spill any of it?

A. I can't say. Yes, I did, too. I remember now. Spilled some down on the lumber.

Q. Were you sitting or standing?

A. We were sitting down.

Q. Do you know whether any of it got on his clothes or not?

A. No, sir, I don't know.

Q. Then, where were you when the bottle was filled?

491 A. Just leaving Howard.

Q. Then how long did you remain with him, I mean, where did he leave you next, if he left you at all?

A. Just as the train run into Page.

Q. You and he stayed there on that lumber pile until the train ran into Page?

A. Yes, sir.

Q. Did he take a drink any time from the time you got with him until he got off the car at Page?

A. No, sir.

Q. Had you been drinking any yourself that day?

A. No, sir.

Q. You are not a drinking man, are you?

A. No, sir.

Q. What were you doing with a bottle of whiskey?

A. I was taking it home to my folks.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. You took it home and did what with it?

A. Taken it home and give it to my wife.

Q. How much whiskey did you say you had?

A. I had a quart.

Q. Where did you get it?

A. At Mena.

Q. How much did you pay for it?

A. I ain't sure but I think I paid a dollar and a quarter.

Q. How much did you give Leslie Old?

A. I gave him about what there are—as much as there are in that bottle. (Indicating to the bottle in testimony.)

492 Q. How much do you say that is?

A. I would say it is two-thirds full.

Q. What is the size of that bottle?

A. Well, I would judge it to be a little less than a half a pint.

Q. Did you see Old at Mena?

A. No, sir.

Q. Take any drinks with him at Mena?

A. No, sir, I never seen him at Mena.

Q. Did you take any drinks at Mena?

A. I had taken a drink of beer, a glass of beer.

Q. You never drink any you said just a moment ago, now you say you took a glass of beer.

A. I said I didn't drink whiskey.

Q. What else did you drink besides beer?

A. I never drank anything else.

Q. How much beer did you take while you were at Mena?

A. One glass.

Q. Anybody take a drink with you?

A. Yes, sir.

Q. Who?

A. Shultz that lives at Heavener.

Q. You didn't let conductor Eames know about you giving this whiskey to one of his brakemen?

A. No, sir.

Q. You knew that Leslie Old was on duty, didn't you?

A. Yes, sir.

Q. Do you know whether he was drinking or not?

A. If he was drinking I didn't detect it.

493 Q. Were you paying him for your fare by giving him this whiskey?

A. No, sir.

Q. Did he pay you for the whiskey?

A. No, sir.

Q. Did you have your part of the whiskey in a quart bottle?

A. I had it in a quart bottle.

Q. Where did you get this bottle? (Indicating bottle on table.)

A. Mr. Old he brought it—

Q. Where did you get it I say?

A. This bottle?

Q. Yes?

A. I never had that bottle.

Q. Did you see where Mr. Old got that bottle?

A. No, sir.

Q. You don't know what it had in it before you saw it?

A. I do not.

Q. It is a regular whiskey bottle, isn't it?

A. It looks to be.

Q. It has a glass stopper like the regular whiskey bottle, hasn't it?

A. I see a great many of them with that.

Q. You haven't examined this to see whether or not it is the same kind of whiskey you used?

A. No, sir.

Q. Could you tell it by tasting it to see whether or not it is the same kind of whiskey you bought at Mena?

A. No, sir, because I never tasted that I bought at Mena.

494 Q. What kind of label was on the bottle you poured the whiskey in for Old?

A. I don't know. It seems there was a label on the bottle but I couldn't tell.

Q. Whiskey label?

A. Well, I couldn't tell.

Q. You didn't take the label off yourself?

A. No, sir.

Q. He didn't take it off in your presence?

A. No, sir.

Q. Did you see him after you got to Heavener and after his body was brought in there?

A. Yes, sir.

Q. Did you see the bottle there?

A. No, sir.

Q. You were not at the station when they brought his body in then?

A. No, sir; I wasn't there.

Q. Are you in the habit of riding through freight trains and giving brakemen whiskey?

A. No, sir; I am not.

Judge FEAZEL: We object to that if the Court please. We went over all that the other day.

Court: Yes, don't go over that.

Defendant excepted to the ruling of the Court.

Q. What did you say your business was now?

A. Saw filer.

Q. What?

A. Filing saws in saw mills; filing circle saws.

495 Redirect examination.

Questions by Judge FEAZEL:

Q. Leslie didn't have that bottle when you first told him you would give him the whiskey, did he?

A. No, sir.

Q. Do you know where he got it?

A. No, sir.

Q. He left you to get it, didn't he?

A. He got off and went down toward the engine.

Q. When he came back he had an empty bottle, did he?

A. Yes, sir.

Q. Was that at Rich Mountain?

A. No, sir, it was at Howard.

Witness Excused.

496

Testimony of A. C. Holt.

A. C. HOLT, having previously been sworn, is called by the Plaintiff in rebuttal and testified as follows in response to questions propounded by Judge Feazel:

Q. Mr. Holt, are you personally acquainted with the young man, Tucker, that was operator at Page at the time Leslie Old got killed?

A. The agent?

Q. Yes?

A. Yes, sir.

Q. You and he discussed that rock throwing that night, did you not.

Mr. McDONOUGH: That is objected to your Honor, as not rebuttal.

Court: Go ahead.

Defendant excepted to the ruling of the Court.

A. Yes, sir.

Q. What did he tell you with reference to where that rock came from?

Court: Better ask him the direct statement as you asked Tucker.

Q. You had a conversation with him about where the rock came from?

A. Yes, sir.

Q. Did he not tell you that rock came from the caboose?

A. Yes, sir, when I went and asked for a light he told me some brakeman threw a rock in the window, and I asked him where the rock came from and he said the caboose.

497 Cross-examination.

Questions by Mr. McDONOUGH:

Q. Didn't he say it was Leslie Old?

A. No, sir.

Q. Didn't call his name?

A. No, sir.

Q. He said it was one of the brakemen?

A. Yes, sir.

Q. The one he had the quarrel with?

A. I understood him to say one of the brakemen?

Q. In the same conversation he said he had a quarrel with Mr. Old?

A. No, sir, he didn't call Mr. Old's name.

Q. But he said he had a quarrel with some brakeman?

A. Yes, I went there and asked for a light and he made that remark.

Witness Excused.

498 Judge FEAZEL: Now, if the Court please, I want to offer the deposition of one Mr. Miller.

Court: Very well.

Mr. McDONOUGH: Object to it as not rebuttal, or competent or relevant. I object to each question and each answer as not rebuttal or not competent, material or relevant.

Court: That is competent.

Defendant at the time excepted to the ruling of the Court and asked that its exceptions be noted of record, which is done. Deposition is here introduced and read to the jury, and is in words and figures as follows, to-wit:

499 In the Little River County Circuit Court, July Term, 1913.

SAM E. LESLIE, as Admr. of the Estate of Leslie A. Old, Deceased,
for the Benefit of Deceased's Wife, Annie May Old and Her
Infant Child, William J. Old, Jr., Pl'ff,

VS.

THE K. C. S. Ry. Co., Def't.

Testimony of Jno. F. Miller.

JOHN MILLER, being duly sworn testified as follows:

Q. Where do you live.

A. At Poteau, Oklahoma. My name is Joh- F. Miller. My profession, or avocation in life is that of an embalmer. I have license to pursue that business issued by the State Board of Oklahoma, the number of my license being 253. I remember the occasion of the death of Leslie A. Old at Page, Oklahoma, some time during the month of March, 1913. One Mr. M. L. Hall of Heavener, Oklahoma called upon me to embalm the body of Mr. Leslie A. Old on the occasion of his death, which was about the 24th day of March, 1913. Mr. Hall at that time was engaged in the undertaking business at Heavener, Oklahoma. In embalming the body of a dead person it is necessary to draw from the stomach all the contents thereof, and I did that in the case of Mr. Old to the best of my ability. I had heard that it was alleged that Mr. Old was drunk or intoxicated at the time of his death and for that reason I made a careful investigation of the contents of his stomach to ascertain if possible, any trace of alcohol therein, and I found none. I found no trace of alcohol anywhere in his system.

(Signed)

JOHN F. MILLER.

500 Subscribed and sworn to before me this the 25th day of
June, 1913.

A. A. ELLERBEE, N. P.

Judge FRAZEL: Now I want to introduce also the deposition of
Mrs. Texana Witt.

Mr. McDONOUGH: I object to it. She is right here in town.

Court: I don't think the testimony is competent.

Plaintiff excepted to the ruling of the Court.

Plaintiff Rests in Rebuttal.

501 Defendant introduces the following testimony in surrebuttal:

Testimony of Dr. C. Cochran.

Doctor C. COCHRAN, called as a witness in surrebuttal by the defendant, having previously been sworn, testified further as follows: in response to questions propounded by Mr. McDonough:

Q. Dr. Cochran, how long has you been engaged in the practice of medicine and surgery?

A. About thirty-five years.

Q. If a man was under the influence of whiskey considerably, and if he is fatally injured while he is under the influence of whiskey, and if, on account of that fatal injury he vomits very great deal, state whether or not after his death, in embalming him and in drawing the contents of his stomach out, whether or not, in your opinion as a physician, there would be found any whiskey in his stomach, although he may have been drunk before he was hurt?

A. Not under those circumstances, no, sir, not any.

Cross-examination.

Questions by Judge FEAZEL:

Q. Would there be any in his system?

A. Yes, sir.

Q. Did you ever extract the contents of a man's stomach, take the contents of his stomach out to ascertain that?

502 A. Yes, sir. You wouldn't look in his stomach for it. It would be in the brain.

Q. Why wouldn't it be in the stomach?

A. That seems to be the receptacle that retains it.

Q. How is it, if a man vomits and he has been drinking whiskey you can smell it?

A. You have got to have whiskey in the stomach in order to have the odor in the vomit.

Q. How long would the odor remain in the vomit?

A. It is owing to the kind of whiskey.

Q. Then the vomit is the same kind of material that is left in his stomach? When it comes from there it is like it comes from his stomach?

A. Yes, sir.

Q. Then, if the odor is in his stomach when it comes out, then is it not true that it is in his stomach?

A. If there would be rapid v-mit there would be nothing in the stomach.

Q. Suppose he vomited only one time?

A. If there was a large quantity of whiskey in the stomach there would be whiskey in the stomach.

Redirect examination.

Questions by Mr. McDONOUGH:

Q. If he vomited thoroughly there wouldn't be any there?

A. No, sir.

Witness excused.

503

Testimony of Dr. York.

Doctor YORK, called by the Plaintiff, in rebuttal, after being duly sworn, testified as follows in response to questions propounded by Judge Feazel:

Mr. McDONOUGH: I object to this testimony for the reason this doctor has been in the court room. The principal ground it is not rebuttal. If they had any evidence on the line that Doctor Cochran testified about it was their business to introduce it before they closed. Now, they have closed their case.

COURT: It can only be introduced as rebuttal of Doctor Cochran's testimony.

Mr. McDONOUGH: If they can introduce him I should have a right to bring in another doctor.

COURT: Go ahead.

Defendant at the time excepted to the ruling of the court and asked that its exceptions be noted of record, which is done.

Q. Where do you live, Doctor York?

A. Ashdown.

Q. How long have you been living at Ashdown?

A. Seven years.

Q. What is your profession or avocation in life?

A. Physician.

Q. How long have you been engaged in the practice of medicine?

A. Twelve years.

Q. Dr. York, will you please state to the jury whether or not a man who had drunk whiskey, and the contents of his
504 stomach were taken from him, the odor of the whiskey or the alcohol could be discovered in the contents of his stomach in the contents you take out of his stomach?

A. It could, yes, sir.

Q. Suppose he had vomited once what effect would that have, if any?

A. It would be impossible for a man to vomit his stomach up, vomiting it entirely.

Q. Then, if he left anything in his stomach, it would be just like that that came out, the same odor and all, would it?

Mr. McDONOUGH: Objected to as leading.

The court overruled the objections of the defendant and defendant excepted.

A. Within a radius of the length of time it would be, yes, sir.

Q. How long would that remain there?

A. Several hours where the circulation and everything was still going on; indefinite where circulation had checked. Remain there for days if circulation was checked.

Q. Well, if he was to die shortly it would remain there?

A. Indefinitely.

Cross-examination.

Questions by Mr. McDONOUGH:

Q. As long as the circulation kept up the whiskey would be carried out of the stomach?

A. Yes, sir.

Q. Whiskey doesn't stay in the stomach very long?

505 A. It has been known to stay six or eight hours.

Q. That is where there was no digestion or no circulation?

A. Where they had been on a debauch.

Q. Where they had been working and got drunk it would get out sooner.

A. Yes, sir.

Q. Now, then, if a man was active and at work and in good health and hadn't taken very much, and then get hurt and vomited thoroughly and several hours passed before he drank any whiskey—I mean several hours passed between the last drink and death you wouldn't be likely to find anything in his stomach?

A. What time will you put the vomit in there?

Q. Shortly before death.

A. Well, it would be impossible, as I said a while ago, for a man to empty his stomach to vomit.

Q. Suppose the circulation has carried the drunkenness in the system?

A. If it was all gone there would be none in the stomach.

Q. As long as it remains in the stomach it is not in the head?

A. No, sir.

Q. It is only after it gets in the head and blood either he becomes drunk?

A. Yes, sir.

Q. If the whiskey is taken out of the stomach you can't get—

506 A. Nothing more. It would show no more there than it would any other part of the body.

Q. If you take out the walls and examine it you wouldn't know whether the whiskey was in the walls or not? There is no more in the walls than in the brain, is there?

A. No about the same.

Witness excused.

Both sides at this point rested and the above is all the evidence.

507 Mr. McDONOUGH: I desire to save an exception to the argument of plaintiff's counsel as to putting the grab iron on the car.

The COURT stated to Counsel: "I am anxious to proceed with the case. I have not time to hear your specific objections to the instructions now. You may dictate them to the stenographer and present them later."

Counsel for defendant dictated to the stenographer in the absence of the Court and has presented with his bill of exceptions the following objections for the first time:

508 *Defendant's Objections to Plaintiff's Instructions.*

Defendant objects to instructions given on motion of the plaintiff as follows:

The objections to Number One. There is no evidence upon which this instruction can be founded. Objection 2. Said instruction is indefinite, uncertain and misleading, and does not distinguish between the alleged cause of action claimed by the widow and next of kin, and the cause of action, if any, claimed by the plaintiff as the survivor.

The said instruction is also erroneous because it leave- the jury to find for the plaintiff the total amount for both causes of action regardless of the negligence of deceased. Said instruction is erroneous because it is indefinite and uncertain in not pointing out the alleged insufficiency upon which the cause of action is claimed to have been based.

Objections to Number Two instructions given by Plaintiff. The said instruction is misleading because it brings into the case an error instructing the jury upon the question of inspection whereas there is no controversy on the subject of inspection in the case. Said instruction is also erroneous because it has no testimony to support it or the question of it being the duty of the inspector to cut out the cars in controversy. The said instruction is also indefinite and uncertain because it is not confined to National Zinc Company car number seventeen and S. F. R. D. car number 6239. Said instruction is also erroneous because it is misleading and uncertain as to the kinds of ladders, hand holds and irons that are referred

509 to, and leaves to the jury the decision of the question of whether or not the rulings of the Interstate Commerce Commission, under the laws of the United States, have provided proper ladders, grab irons and hand holds for cars now in use. There is no evidence upon which to base said instruction. Said instruction is also erroneous because it leaves out of consideration the question of the negligence of the deceased.

The defendant objects to Plaintiff's instruction numbered two and a half on the following ground: Said instruction is erroneous, an improper definition of the word negligence, and the same is misleading to the jury and there is no evidence in the case upon which to base said instruction.

Plaintiff objects to instruction numbered three given on the plaintiff's motion upon the following grounds: there is no evidence in the record upon which to base this instruction: second, the said instruction is misleading and erroneous, and comments upon the facts and

invades the province of the jury. It is indefinite and uncertain because it refers to the tank car described in the complaint and does not refer to the tank car referred to in the evidence. It is also erroneous because it incorrectly describes the duty of the brakeman. It is also erroneous because it submits to the jury the determination of the question of where the cars or car should be placed in the making up of said train. It is also erroneous because there is no evidence in the record upon which the jury find that it was negligence to place National Zinc Company tank car next to S. F. R. D. refrigerator car. It is also erroneous because there is no allegation in the complaint upon which this instruction can be based.

Defendant objects to instruction numbered four given on motion of the plaintiff, upon the following grounds: There is no evidence in the record upon which to base this instruction. Said instruction is misleading and otherwise erroneous. There is no evidence in the record to show that the jerking of the train caused deceased to fall. There is no evidence to show that defendant could have prevented the fall of the deceased, in so far as same was caused, if at all, by the jerking or lurching of the train.

Defendant objected to instruction numbered five upon the following grounds: There is no evidence upon which to base this instruction. Said instruction is commenting upon the evidence. Said instruction is not the law.

Defendant objects to instruction numbered six given on behalf of the plaintiff upon the following ground: There is no evidence upon which to base this instruction, and said instruction is misleading and erroneous, and is not the law. It comments upon the facts and assumes that the defendant was guilty of negligence, and assumes that the deceased did not assume the risk of his employment.

Defendant objects to instruction numbered seven, given on motion of the plaintiff, as follows: The said instruction is misleading and erroneous, and is not supported by any evidence and is not the law. Said instruction assumes that the defendant is guilty of negligence.

Defendant objects to instruction numbered eight given on motion of the plaintiff, upon the following grounds: Said instruction is misleading and is not the law. There is no evidence in the case upon which to base said instruction. There is no evidence in the case to say that deceased was injured in passing from one car to the other. Said instruction is misleading and indefinite and uncertain because it does not confine deliberations of the jury to the National Zinc car numbered seventeen and S. F. R. D. car numbered 6239. Said instruction is also misleading on the subject of assuming risk and on the the question of the habit of many men in doing certain acts. Said instruction does not properly instruct the jury upon the assumption of risk.

The defendant objects to instruction numbered nine given on motion of the Plaintiff, upon the following grounds: There is no evidence upon which to base this instruction. The instruction comments upon the evidence and invades the province of the jury in

commenting on the weight of the evidence, and is erroneous in telling the jury that a fact may be established by circumstantial evidence and is also erroneous in defining circumstantial evidence. It is also erroneous in telling the jury that a conclusion from circumstances may be fairly and reasonably enforced.

Defendant objected to instruction numbered ten, which is upon the measure of damages, upon the following grounds: There
512 is no testimony in the record upon which to base this instruction. The said instruction is erroneous because it is misleading and because it leaves the jury to guess and conjecture the amount, and there is no evidence in the record from which the jury would be authorized to — amount of contributions the deceased would have given the plaintiff. Said instruction is erroneous also because it authorizes a recovery in Plaintiff's — for the support and maintenance of the next of kin, for conscious pain and suffering, and because said instruction does not require the jury to find the amount due on the ground of support separately and the amount due conscious pain and suffering separately, as under the Safety Appliance Act and under the Employers' Liability Act of Congress of April 22nd, 1908, and the amendment thereto, the amount to be recovered, if any, by the plaintiff as representative of the next of kin, must be limited to the amount the deceased would reasonably have contributed, and this instruction does not so limit it, and leaves the jury to conjecture and guess the amount without any testimony, and contrary to law and contrary to said acts of Congress. Said instruction is also erroneous because it authorizes the plaintiff to recover in one sum for pecuniary loss, and for pain and suffering, whereas, if said sums should be recovered in separate amounts. Said instruction is also erroneous because it leaves to guess and conjecture the amount which the jury are to find, if any, for pecuniary loss resulting from the death of deceased to his widow and child. Said instruction is also erroneous because it authorizes the jury to speculate upon the amount of damages, if any, based upon pecuniary loss, and to speculate upon the age, health,
513 habits, occupation, expectation of life and mental and physical disposition to labor and the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. The said instruction is contrary to said acts of Congress, and it has no fixed amount of recovery as required by said acts of Congress, and said instruction is not the law.

Defendant objects to instruction- numbered one, two, three, four, five, and six, given by the Court, because the same is not supported by any evidence, and because same is not the law.

The defendant saves a separate exception to each and every instruction refused on the request of the defendant, and excepted to the action of the Court in overruling defendant's motion for a verdict at the conclusion of the evidence.

All the case.

Certificate.

I, Allen Watkins, Official Court Reporter of the Ninth Judicial Circuit, Arkansas, do hereby certify that these 298 pages are a true and correct transcription of all my shorthand notes taken at said trial and that said shorthand notes are a true and correct report of all the proceedings had in the trial, to the best of my knowledge.

ALLEN WATKINS,
Official Reporter.

514 The above and foregoing is all the evidence that was offered on either side, and that was introduced on either side, and the above shows all rulings of the court on the exclusion or admission of testimony and the objections and exceptions of either party to said testimony and to each and very part thereof.

At the conclusion of the plaintiff's evidence, as shown in the above and foregoing report of the official court reporter, the defendant moved the court to direct a verdict in favor of the defendant. The court overruled said motion, and the defendant at the time excepted. At the conclusion of all the evidence, the defendant requested the court to give a peremptory instruction in its favor, which was instruction numbered 1 requested by the defendant. The court overruled said motion, and the defendant at the time excepted.

At the conclusion of all the evidence, the defendant requested the court to instruct the jury as follows:

515 Defendant's Request for Instructions.

In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie A. Old, Deceased, for the Benefit of Deceased's Wife, Annie May Old, and Her Infant Child, William J. Old, Jr., Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Defendant's Request for Instructions.

1.

The court instructs the jury to find the issues for the defendant.

2.

Under the law and the allegations of the complaint and the evidence, the plaintiff is not entitled to recover in this action, any damages whatever for physical or mental pain and suffering. Under the Employers' Liability Act of Congress of April 22nd, 1908, and the amendments thereto, and under the Constitution of the United States, the plaintiff is not entitled to recover any sum whatever for physical or mental pain and suffering.

8.

In this case the plaintiff brings his action for recovery, basing his right to a recovery upon the Act of Congress of April 22nd, 1908, and the amendments thereto. Under that act, if the deceased, Leslie A. Old, at the time of his death was engaged in Interstate Commerce, the proof, if there is such proof, that he was so engaged in such Commerce at the time of his injury, and that he received an injury while engaged in such Interstate Commerce, will not be sufficient to authorize the plaintiff to recover. Before the plaintiff will be authorized to recover, it must appear by a fair preponderance of the evidence, not only that the deceased was at the time of his injury engaged in Interstate Commerce, but it must also be proved, as hereinafter explained, that his death was due to some negligent act or omission of the defendant. Neither will the plaintiff be entitled to recover upon the proof that the air brakes of the train were out of repair or were not in working condition. Nor will the plaintiff be permitted to recover upon proof that the train was negligently operated, as the same was leaving the station of Page, in the State of Oklahoma.

"If there occurred at the time that the deceased was injured, or a short time prior thereto, or a short time thereafter, violent and unusual jerks of said train and violent and unusual movements of said train, or negligent handling of the same by the engineer, even that proof does not and will not entitle plaintiff to recover, unless it be proved by a preponderance of the evidence, that said jerks of the train, if they occurred, or that the violent swayings and jerkings of the train if such occurred, or that the engineer negligently and carelessly handled his train, if such was done, could have been avoided by the exercise of ordinary care on the part of the employees of the defendant. Even if the jury find from the evidence that there were violent movements of the train, and that the same swayed violently, and with unusual jerks, and even if the jury find that such unusual jerks and movements and violent swayings were due to defective air brakes or to the negligent handling of the train by the engineer, the finding of such facts by the jury will not authorize the jury to find a verdict for the plaintiff, unless the plaintiff goes further and proves by a preponderance of the evidence that such violent jerks or movements of the train, if they occurred, or that such handling of the train by the engineer, if it occurred, actually caused the deceased to fall under the train, and to be injured. The jury will not be permitted to base a verdict on these or other questions upon conjecture but the jury must be able to say upon their oaths, and from the evidence, that said movements of the train, if they occurred, or the negligence of the engineer, if it occurred, actually caused the deceased to fall. If there were such violent movements of the train, and if the engineer was negligent in the movement of said train, and if such violent movements, if they occurred, and if said negligence of the engineer, if it occurred, were not the direct cause of the falling of the deceased, and his consequent in-

jury, then it will be the duty of the jury to return a verdict for the defendant.

518 "In this connection the jury must also consider the question of whether there were any ladders on S. F. R. D. Refrigerator car numbered 6239, and National Zinc Car numbered 17. Even if the jury find that there were no such end ladders on either of said cars, that finding will not entitle the plaintiff to recover. Before the plaintiff would be entitled to recover upon any of said alleged acts of negligence, even if they be true, it must be shown by the plaintiff, by a preponderance of the evidence, that said acts of negligence if they occurred, actually caused the death of the deceased. The existence of such acts of negligence, and the injury to the deceased, do not, and will not authorize the jury to find a verdict for the plaintiff. Before a verdict can be based upon such acts of negligence, even if each of said acts be proved, it must appear by a preponderance of the evidence, that said acts were the cause of the death of the deceased. In reaching a conclusion as to whether said acts of negligence, even if proved, caused the death of the deceased, the jury may consider all facts in evidence tending to prove or disprove the fact as to whether the injury of deceased was due to said acts of negligence, and upon that issue, and in arriving at a conclusion thereon, the jury may consider circumstantial evidence, if there is such on the issue, and give such weight to such evidence as the jury believes it should have, and if there is such circumstantial evidence, and if the evidence is sufficient under the law and the evidence to warrant a finding to the effect that said acts of negligence if proved, caused the death of the deceased, then the jury might find that issue in favor of the plaintiff. However, in determining that issue, and in considering the circumstantial evidence, if there be such the jury will not be permitted to conjecture a verdict or to reach a conclusion on that issue by conjecture. And if the circumstantial evidence, if there be such, points equally to the conclusion that the death of the deceased was due to other cause than the negligence alleged, the jury must find for the defendant.

4.

"Before the jury would be authorized to find that the deceased was injured in passing from S. F. R. D. car numbered 6239 to the National Zinc Car numbered 17, there must be some evidence tending to prove that the deceased did actually attempt to pass from one of the said cars to the other. If there is no proof tending to show that Leslie Old, the deceased, attempted to pass from said refrigerator car numbered 6239 to National Zinc Car numbered 17, then necessarily the jury would not be authorized to find that the deceased was injured by attempting to pass from one of said cars to the other. In other words, if there is no evidence to show that the deceased attempted to pass from said refrigerator car to the tank car, then the jury cannot find that the deceased was injured in passing from said refrigerator car to the tank car. The jury will not be permitted to conjecture without evidence, that the deceased did attempt so to pass from one of said cars to the other.

5.

"Evidence that the deceased was upon S. F. R. D. Car numbered 7498, and that in the discharge of his duty he would pass from that car onto the next car north, or in front, and hence to the tank car, will not be sufficient to authorize the jury to find that deceased was injured in passing from the refrigerator car numbered 6239 to the tank car numbered 17.

6.

"Neither will the jury be permitted to conjecture that the deceased was injured by violent movements and jerkings of the said train, if they occurred, from the fact, if that be true, that said movements or jerkings occurred at about the time that the deceased was injured by said train. The occurrence of the movements, whether due to the negligent handling by the engineer, or whether due to defects in the air brake attachments, and the injury to the defendant are not sufficient to show a causal relation between said alleged acts of negligence and the injury to the deceased. Before the plaintiff could recover upon the allegations that the air brake attachments were out of repair, and that such defects in such air brake attachments caused the violent movements of the train and the injury to the deceased, it must first be proven by the plaintiff by a preponderance of the evidence, that the air brake attachments were out of repair, and second, that said defects in the air brakes, if they existed, caused the violent movements of the train. Before the jury could find that the violent movements of the train were due to the negligence of the engineer, there must be some proof tending to show that the engineer was negligent in that respect, and that such negligence caused said violent movements, if said movements and jerkings did occur. However, even if the jury should find that the air brake attachments were out of repair, and even if the jury should find that there were defects in said air brake attachments, and that said defects and said condition of said air brake attachments being out of repair actually caused the violent movements and jerkings of said train, if the latter occurred, or if the jury should find that the negligence of the engineer in handling the air brakes, or in otherwise handling the train actually caused the violent movements and jerkings of the train, if the latter existed, nevertheless these findings by the jury that said violent movements and jerkings of the train were actually caused either by the air brakes being in a defective condition, or by the negligence of the engineer, would not authorize the jury to find that the deceased was injured by reason thereof.

7.

"Even if the jury find that the engineer was negligent, and that such negligence caused the violent jerkings and movements of the train, or if the jury find that there were defects in the air brake attachments, and that said defects, if they existed, actually caused the violent movements and jerkings of the train, nevertheless such

finding will not entitle the plaintiff to recover in this action. Even if the jury should so find, before the plaintiff can recover, the burden is upon the plaintiff to prove not only that said defects existed, but that said defects, or one of them, actually caused the injury to the deceased. In arriving at a conclusion on that subject, the jury will not be permitted to conjecture that such defects or defect, if they existed, caused the injury of the deceased. If such defect or defects existed, and if such defects caused violent movements and jerkings of the train, and if such violent movements and jerkings occurred at or about the time that the plaintiff's injury occurred, still that would not be sufficient to authorize a verdict for the plaintiff. The plaintiff must go further and prove a causal relation between such defects and the injury to the deceased.

"The jury will not be permitted to conjecture that defects existed in the air brake attachments by the occurrence of violent movements and jerkings and swayings of the train at or about the time the deceased was injured. Neither will the jury be permitted to find that there were any defects in the brake attachments of any car in said train before the arrival of said train at the Town of Page, in the State of Oklahoma.

8.

"If it be true that there existed trouble in some cars in said train prior to the arrival of the same at Page even the existence of that trouble will not authorize the jury to find that the air brake attachments were out of repair. Before the jury can find that the air brake attachments were out of repair, the plaintiff must prove by a preponderance of the evidence, that such defects did exist, and even if the plaintiff proves by evidence, that defects did exist in said air brake attachments, that proof will not authorize the jury to find that the violent movements and jerkings occurring as the train moved out of Page, if such violent movements and jerkings did occur, were caused by defects in the brake attachments. Before the jury would be authorized to find that defects existed in the air brake attachments, there must be evidence to prove that such defects existed, and the occurrence of the violent movements and jerkings, if such existed, as the train moved out of Page cannot be considered as evidence in tending to show the existence of defects in the air brake attachments. In other words, the jury will not be permitted to find the existence of defects by proof of violent movements and jerkings, and then also find that the violent jerkings and movements, if they existed, were caused by defects in the air brake attachments.

9.

"Trouble may occur in air brake attachments, even when said attachments are in good order and condition. Hence the jury are not authorized to find defects in air brake attachments by proof that trouble occurred.

10.

"Violent jerkings and movements in a freight train may occur from the ordinary operation of said train. Therefore, the jury are not authorized to find that the engineer was negligent in the operation of said train, even though the jury should find that there were violent jerkings and movements of said train as the same moved out of the station of Page. Even if there occurred in said train as it moved from Page, unusual jerkings and violent movements of said train, said unusual jerkings and violent movements, 524 if they occurred, will not authorize the jury to find that the engineer was negligent in the operation of the train. In other words, proof, if there is such proof, that there were unusual jerkings and violent movements of the train, are not sufficient alone to prove that the engineer was negligent, and that such violent jerkings and unusual and violent movements were the result of the negligence of the engineer. The happening of unusual and violent jerks and movements, if they did occur, cannot be alone sufficient to authorize the jury to find that the engineer was negligent, and that such negligence caused such violent movements of the train.

11.

Neither will the jury be authorized to find that the negligence of the engineer, if it existed, and defects in the air brake attachments, if such defects existed, combined and operated together to produce the violent and unusual jerks and movements of the train, if such occurred. Proof that there was trouble on some of the cars with the air brake attachments, and proof that there were unusual and violent jerkings and movements of the train as it moved out of Page alone are not sufficient to prove that the engineer was negligent, and that such negligence caused the violent jerkings and unusual jerkings, if they existed, nor is such proof sufficient to authorize a finding that the air brake attachments were out of repair. Nor would such proof if there is such, authorize the jury to find that the violent and unusual jerkings and movements of the train were caused by the negligence of the engineer, if it existed, 525 combined with the defects in the air brakes, if such defects existed, and thereby caused the injury to the deceased. If the unusual and violent jerkings of the train, if there were such, were due to other causes, the plaintiff cannot recover.

12.

There is no proof in this case tending to show that there were any defects in the grab irons, hand holds or ladders on National Zinc Car numbered 17 or S. F. R. D. car numbered 6239. Plaintiff is therefore not entitled to recover, if at all, on any claim of the existence of defects in said ladders, grab irons or hand holds. The only ground upon which plaintiff claims a right to recover on account of hand holds, grab irons or ladders, is that said refrigerator car last above named and the tank car, were not provided with

proper hand holds, grab irons or ladders. In other words, on that point it is alleged that the defendant did not use ordinary care in placing on said refrigerator car and on said tank car sufficient hand holds. On that point the court instructs the jury that the defendant could not refuse to receive and transport said cars belonging to other transportation companies, or other owners, provided said cars had such hand holds, ladders or grab irons as are reasonably safe, or provided said cars were equipped with the usual and customary ladders, hand holds and grab irons that are found on cars of that kind in this part of the United States.

"If said tank car and said refrigerator car were provided with such hand holds, grab irons and ladders as are customarily found on a considerable proportion of similar cars similarly constructed, the defendant was bound to receive said cars for transportation, and could not decline the same, and even if it be true that other companies and other cars have more hand holds, grab irons or ladders than said tank car numbered 17 and refrigerator car numbered 6239 had, nevertheless the fact that 50% of cars similarly constructed and used, or the fact that even 75% of similar cars had additional hand holds, including hand holds on the end, would not authorize the defendant to refuse said cars, because not properly equipped, nor would it authorize the plaintiff to recover herein on the ground of alleged negligent use of said cars with the hand holds which said cars had thereon.

13.

"The owners of said tank and refrigerator cars had the right to have said cars transported, if said tank car and said refrigerator car were equipped with the hand holds provided by the Interstate Commerce Act of Congress and the rules and regulations of the Interstate Commerce Commission, and if said cars were equipped as provided by the Interstate Commerce Act of Congress, and as required by the rules and regulations of the Interstate Commerce Commission, the presumption would be that said cars were properly equipped and the jury would not be authorized to find that the defendant was negligent in using said cars on the ground that said cars did not have end ladders or other grab irons or ladders. In other words, if said cars had the grab irons, ladders and hand holds as now required by the Act of Congress, and by the rules of the Interstate Commerce Commission, that fact was sufficient to authorize and require defendant to receive and transport said cars, and it cannot be held liable on the allegation that there were insufficient hand holds, ladders or grab irons on said cars, by proving that it would have been safer to have placed on said tank car and on said refrigerator car end hand holds or other additional hand holds to those already on said cars.

14.

"The presumption is that there were sufficient ladders, grab irons and hand holds on said car. The duty which the defendant in the

exercise of ordinary cars owes to the deceased, does not require the defendant to provide more ladders, hand holds and grab irons than is required by the law. Therefore, if said cars were equipped with the hand holds, grab irons and ladders as now required by the Interstate Commerce Commission, such fact raises the presumption that it is not negligence, and the jury would not be authorized to find that the defendant was negligent in not putting on said tank car and refrigerator car, additional hand holds, by proof from various witnesses that it would have been safer to have had end ladders on the end of said refrigerator car, nor by proof, if there is such, that it would have been safer to have had end ladders on the said tank car. On that allegation the jury cannot find negligence by proof that it would have been safer to have had said end ladders on said car.

“Under the Interstate Commerce Act of Congress of April 22nd, 1908, and the amendments thereto, and under the rules and regulations of the Interstate Commerce Commission, which rules and regulations are duly authorized by said Act of Congress, it is not negligence for the defendant to receive National Zinc Company tank car numbered 17 and S. F. R. D. refrigerator car numbered 6239, and if there are no defects in the hand holds, ladders or grab irons on said cars, then the plaintiff cannot recover, even though the jury should find that it might have been safer to the deceased for the defendant to have had on said refrigerator car end ladders, hand holds or grab irons.

15.

“Under the Interstate Commerce Act of Congress of April 22nd, 1908, and of the amendments thereto, and under the rules and regulations of the Interstate Commerce Commission, and under the Act of Congress of April 14th, 1910, and under the Act of Congress known as the Safety Appliance Act, and under the Act of Congress approved April 14th, 1910, and the amendments thereto of June 30th, 1912, and March 4th, 1911, and under the rules and regulations of the Interstate Commerce Commission, based upon said acts of Congress the defendant in this cause was not required to place on National Zinc Company tank car numbered 17 any hand holds, grab irons or ladders than were upon the same, and it was not negligent for the defendant to have said car in said train, and to use the same with the hand holds thereon, and the action of the defendant in using said car thus equipped, is not negligence, and no recovery can be based thereon in favor of the plaintiff.

16.

“Under the Act of Congress of April 14th, 1910, as amended on March 4th, 1911, and June 30th, 1912, and under the regulations of the Interstate Commerce Commission, duly adopted, and based upon upon said Acts of Congress, the defendant in this cause had the right to accept, receive and transport refrigerator car S. F. R. D. and numbered 6239, with the hand

holds, ladders and grab irons thereon, as described in the evidence. Under said Acts of Congress and the regulations of said Commission, it was not negligent for the defendant to receive said refrigerator car and transport the same without any hand holds or without other hand holds than those shown to be thereon by the testimony and the plaintiff in this case is not entitled to recover upon the allegation that said refrigerator car did not have end ladders, grab irons or hand holds thereon and no recovery can be based upon that allegation of negligence.

17.

"It is alleged in the complaint that oil cars, box cars or refrigerator cars were placed irregularly and indiscriminately in the make-up of said train. The court instructs the jury as a matter of law that under the Interstate Commerce Acts of Congress and under the Saf-ty Appliance Acts of Congress, the defendant has the right to make up its train as to the disposition of the cars in such manner as it saw proper, and the plaintiff is not entitled to recover on the above allegation, even if it should appear from the testimony that the cars were indiscriminately placed therein.

18.

"It is also alleged that there were in the train coal cars and other low cars, which could have been placed next to the high refrigerator car, and that, if that had been done, the deceased might not have been injured. The court instructs the jury that the plaintiff cannot recover upon that allegation in the complaint.

19.

"It is also alleged in the complaint that there was a railing around the sides of the oil tank, and that there was a space on the floor between the side of said railing and the tank, and that that space or floor constituted the only walkway or passage way provided for brakemen in passing over said oil car. The court instructs the jury as a matter of law, that that allegation is immaterial, and the jury will not consider the same in arriving at a verdict herein, and cannot base a verdict upon that allegation.

20.

"It is also alleged in the complaint that the floor of the tank car was seven or eight feet lower than the runway on top of the refrigerator car. The court instructs the jury that the plaintiff cannot recover upon that allegation in this action.

21.

"It is alleged in the complaint that the defendant placed the tank car which was a low car, immediately in front of the refrigerator car, which was a high car. The court instructs the jury that such

placing of said cars is not negligence, and the plaintiff cannot recover on that account.

22.

531 "It is also alleged in the complaint that there were no ladders or grab irons or hand holds on the end of the refrigerator car, next to the oil car. The court instructs the jury as a matter of law, that the plaintiff cannot recover on that allegation.

23.

"It is also alleged in the complaint that there were no means or appliances whatever provided by the defendant to enable the brakemen to go safely from the top of the box car or refrigerator car onto the platform of the tank car, except a ladder down the side of the refrigerator car. The court instructs the jury that the plaintiff cannot recover in this action upon that allegation. Neither can the plaintiff by reason of said acts of Congress heretofore referred to, recover upon the allegation that it was necessarily dangerous for the brakemen to pass from the refrigerator car to the tank car by the use of the ladders or hand holds on the side of the refrigerator car.

24.

"It is further alleged in the complaint that the absence of grab irons or ladders or hand holds from the end of the refrigerator car made it unnecessarily hazardous for the brakemen to pass from the top of the said refrigerator car to the platform of the tank car. The court instructs the jury that under said Acts of Congress, such allegations are immaterial and the plaintiff cannot recover thereon.

25.

532 It is also alleged in said complaint that there were no grab irons, hand holds or ladders on the end of the tank car which was immediately in front of said refrigerator car, and it is also alleged that there were no other appliances on said tank car to enable the brakemen in passing from the refrigerator car to the tank car to hold to and steady himself while making said passage. This allegation is immaterial, and under the said Acts of Congress heretofore referred to, the plaintiff cannot recover thereon.

26.

"It is also alleged in said complaint that just before the defendant's train reached the station of Page, the air in said train failed to work properly, and because thereof, said train could not be handled or controlled properly or evenly. The court instructs the jury that plaintiff cannot recover on that allegation, as the same is immaterial and the jury will not consider the same.

27.

"The court instructs the jury that if said train had defects in its air brake appliances, which defects occurred just before the arrival of the train at Page, and if said defects in the exercise of ordinary care could not have been known, or if known to the employees in charge of said train could not have been repaired, then the existence of said defects would not be evidence of negligence, and a recovery could not be based on the same in this action.

533

28.

"It is alleged in the complaint that the deceased got on top of the train on the front end of the second refrigerator car from the tank car. The court instructs the jury that that allegation is immaterial and the plaintiff cannot recover thereon.

29.

"It is also alleged that the deceased, after getting upon the second refrigerator car from the tank car proceeded towards the front end of his beat or section, which carried him over the refrigerator car immediately in the rear of the oil car. From that allegation the jury are not entitled to infer without evidence, that the deceased did pass over refrigerator car numbered 6239. Before the jury can find that the deceased walked over refrigerator car numbered 6239, and attempted to pass from that car to the tank car, there must be evidence upon which to base such a finding. The existence of a duty to go in that direction alone would not be a sufficient finding that deceased attempted to pass from the refrigerator car to the tank car, and by reason thereof fell and was injured.

30.

"It is alleged in the complaint that when said train began to move out of the station of Page, that there were violent jerkings and swayings and movements of the train, and that these movements were violent and unusual. It is alleged that these movements were due either to the negligence of the engineer, or to a defective condition of the air or to some cause unknown to the plaintiff. The court instructs the jury that they are not to consider the allegation that these jerkings and movements were due to causes unknown to the plaintiff. If said jerkings and movements were due to causes that were unknown to the plaintiff, that fact would not entitle the plaintiff to recover.

534

31.

"The negligence of the engineer will not be inferred, nor will it be inferred that there were defective conditions in the air brakes. The law presumed that the master has performed his duty. In this case the law presumes that the air brakes were in good condition, and that the engineer operated the engine and train with due care. Even if there were violent and unusual movements, their

existence does not prove, and cannot be considered to prove a defective condition of the air brakes, nor negligence of the engineer in operating the train. The happening of the accident and the consequent injury do not raise a presumption of negligence. From the happening of the accident and the injury resulting, no negligence can be inferred. Nor can negligence be inferred even if there is proof that there was a defective condition of the air brake attachments. Nor can it be inferred from the violent movements and jerkings, if such occurred, that they were due to the negligence of the engineer. Even if the jury are authorized to find that there were defective conditions in the brake attachments, and if they are authorized to find from the evidence that the engineer was negligent in the operation of the train, still those findings would
535 not authorize a finding for the plaintiff upon the ground that the violent jerkings and movements were caused by the defective conditions of the air brake attachments, nor that the alleged negligence of the engineer caused or produced the violent jerkings and movements of the train. And if the jury should find that the brake attachments were defective, and that the violent jerkings and movements of the train resulted therefrom, or if the jury should find that the engineer negligently operated his train, and that the violent jerkings and movements of the train resulted from said negligent operation, still, even those findings will not authorize or permit the jury to find for the plaintiff herein, without further and additional evidence. Even in the latter event it must be shown by a preponderance of the evidence, not only that the engineer was negligent, and that such negligence caused the violent and unusual jerkings and movements, or that the air brake attachments were defective, and that such defective air brake attachments caused the violent jerkings and movements, but the plaintiff, before he can recover, must go further and prove that such violent jerkings and movements, whether produced by the negligence of the engineer, or by the defective condition of the air brake attachments, were the cause of the plaintiff's injuries. The jury can not infer from the injuries to the deceased, and from the existence of a defective condition of the air brake attachments, or from the negligence of the engineer, that these negligences, if they existed, caused the injuries of the deceased. That causal relation must be proved by evidence, and the burden is upon the plaintiff to make that proof.

536

32.

"If the deceased in attempting to get on to a train, slipped and fell, and was thereby injured, or if the deceased, in throwing or attempting to throw a rock into the window of the station or elsewhere, thereby slipped and fell and was injured, he cannot recover, even though the jury should find that the train was negligently operated, or that there were defective conditions in the air brake attachments, and even also if the jury should find that the hand holds and ladders upon said cars were defective and out of repair, or were insufficient and unsatisfactory.

33.

"It is alleged in the complaint that the deceased, in attempting to pass from the top of the refrigerator car to the oil car, while said train was jerking violently, and because of the absence of the ladders or hand holds on the refrigerator car, fell and was injured. The court instructs the jury that that allegation does not entitle the plaintiff to recover. If the deceased knew and appreciated the dangers incident to the violent jerkings and movement of trains, and if the deceased, knowing and appreciating the dangers incident to such violent jerkings and movements of the train, attempted during said movements to pass from the refrigerator car to the tank car, and was injured thereby, he cannot recover.

34.

"It is alleged in the complaint that the deceased was either thrown from the refrigerator car, or from between the ends of the box car, or refrigerator car, and was injured. The court, upon 537 that allegation, instructs the jury that the plaintiff is confined to that allegation on the issues submitted in these instructions. If the deceased was injured by falling off of said train in some other way, or if he was throwing a rock and fell, or if he fell by reason of some unknown cause, or if he fell between other cars in said train, the jury cannot find for the plaintiff.

35.

"It is also alleged in said complaint that the deceased in passing from the refrigerator car to the oil car, fell because of the absence of the end ladders or hand holds, or railings on the end of the oil car, which would have enabled the deceased to hold while making such passage. On that allegation, the court instructs the jury that under the Acts of Congress heretofore mentioned, the plaintiff cannot recover.

36.

"The court instructs the jury that the plaintiff in this cause cannot recover on the allegation that there were no ladders, hand holds or railings on the end of the oil or tank car. There is no proof in this record which would authorize the jury to find that the defendant owed any duty to the plaintiff to provide a ladder a hand hold or a railing on the end of the tank car. Therefore, on that allegation, the jury must find for the defendant.

37.

538 "The court instructs the jury that under the Acts of Congress heretofore referred to, the defendant was not required to place a railing or ladder or hand hold on the end of the tank car, and no such ladder or hand hold or grab iron was required to be on said tank car, except those that are shown to be there, and therefore the absence of a ladder, a hand hold or a railing

from the end of the tank car, except such as the proof shows to be there, is not a ground of recovery in this action.

38.

"It is also alleged in said complaint that it was the duty of the defendant to inspect said tank car and oil car at De Queen. If said cars were inspected, and if said inspection showed that said cars had thereon the ladders, handholds and grabirons shown in the evidence therein, then such proof shows no negligence, and the plaintiff cannot recover on that point.

"As to inspection, the court instructs the jury that the allegation that it was the duty of the defendant to inspect, is not an allegation alleging negligence. The duty to inspect, if performed, would only have shown the handholds, grabirons and ladders that were actually on the car at the time of the accident, and therefore, even if the defendant did not inspect the cars at De Queen at all, yet if those cars had on them the ladders, handholds and all appliances shown in the testimony, the failure to inspect at De Queen, if it occurred, is not a ground of recovery, and on that issue the court instructs the jury to find the issues for the defendant. As to the duty of inspection, the court instructs the jury that the purpose of the act of inspection is to ascertain whether or not there

539 were any defects in the oil and tank cars, and the air brake appliances. If there were actually no defects in said tank car, and in said oil car, and in the ladders, and grabirons and handholds, and if there was no defect in the air brake attachments, which would tend to cause the injury, then the plaintiff would not be entitled to recover on the ground of the allegation of a failure to inspect, even though the plaintiff should show that no inspection was made. In other words, if an inspection would not show any defects, the failure to make an inspection is not actionable negligence.

39.

"It is alleged in the complaint that it was the duty of the inspector of the defendant at the terminal of De Queen to cut National Zinc car numbered 17 and S. F. R. D. car numbered 6239 out of said train. The court instructs the jury that there is no proof in the record tending to show that it was the duty of said inspector to cut the said cars out of said train, and on the other hand, under the laws of the United States, and under the Acts of Congress heretofore referred to, the defendant and the said inspector, did not have the right to cut said cars out of said train. Unless said cars were equipped contrary to law, instead of cutting said cars out, it was the duty of the inspector to place the same in, as he did.

40.

540 "It is alleged in the complaint that the deceased, under the law, had a right to rely and did rely upon the inspector of the defendant at De Queen performing his duty. The court instructs the jury that under the evidence in this case, the plaintiff is not entitled to recover upon that allegation. Even

if the cars were inspected at De Queen, the evidence fails to show any such defects in the ladders, grabirons and handholds, or in the air brake appliances that would justify or authorize the inspector to cut said cars out of said train. The said inspector had no right to cut said cars out of said train, unless the ladders, handholds, grabirons, or air brake appliances were defective, and in bad condition, and in such defective and bad condition as would injure the deceased in the discharge of his duty.

41.

"It is also alleged in said complaint that the deceased had the right to assume that said National Zinc tank car numbered 17 and refrigerator car numbered 6239, were equipped with proper and safe equipments. This does not mean that the plaintiff may recover if said cars were not equipped with proper handholds, ladders and grabirons. If they were equipped with the usual and customary handholds, ladders and grabirons, for such cars, then the plaintiff must fail on that allegation. On the other hand, even if they were not so equipped, the deceased would by using said cars, with knowledge as to how they were equipped, assume the risk as hereinafter explained, and if he did assume the risk as hereinafter explained, he cannot recover.

42.

"It is further alleged in said complaint that it was the duty of the defendant to have the ends of the tank car and the refrigerator car equipped with handholds, ladders and grabirons on the
541 end thereof, and to have such handholds, ladders or grabirons on the end of said cars as would enable the brakemen safely to go from one car to another in the discharge of his duties. The court instructs the jury that this allegation does not authorize a recovery if the plaintiff means thereby to claim a recovery on the ground that the defendant is an insurer of the safety of said cars and of the deceased. The defendant is not an insurer of the appliances, nor does it insure that the brakemen may not be injured in the discharge of their duties. The law does not require the defendant to be the insurer. Under the law the defendant is required only to use ordinary care to select cars that are reasonably safe, and to select air brake appliances that are in reasonably good condition. It is not required to insure and it does not insure that any handhold or any car may be out of repair, nor does it insure that the brake appliances may not get out of repair.

43.

"If the defendant exercises ordinary care in the inspection of said cars, and in use and handling of the same, the plaintiff is not entitled to recover, even though the jury should find that the deceased came to his death by reason of insufficient handholds, grabirons or ladders, or by reason of insufficient and defective air brake appliances.

44.

"It is further alleged in said complaint that it is usual and customary among well regulated railroads operated by reasonably prudent persons to equip its cars with such handholds or grabirons on the end of the same, as would enable brakemen in the discharge of their duties, to go safely from one car to another. This cannot be held to mean that the railroad is an insurer of the brakeman's safety. The railroad is required to use ordinary care in furnishing a reasonably safe car with reasonably safe appliances, and the jury are instructed that even if a majority of the railroads in the United States use ladders, grabirons and handholds on the ends of refrigerator cars, and on the ends of tank cars, still that fact, if proved, would not show that the defendant was guilty of negligence in using the cars in question with the handholds and ladders and other appliances thereon.

45.

"It is also alleged in the complaint that it is customary among the railroads of the country to equip their cars with such handholds, grabirons or ladders on the ends of the cars as would enable brakemen in the discharge of their duties to go safely from one car to another without incurring any unusual hazards or dangers. That allegation is general in its nature, but as set out in the complaint, it refers only to the tank car and the refrigerator car heretofore referred to. If there were other defects in other cars, and if the deceased, by reason of said other defects in other cars fell and was injured, that fact, if proved, would not authorize a recovery in the case on this allegation.

46.

"It is further alleged in said complaint that the defendant, in the exercise of ordinary care, failed to equip the cars in said train with handholds, ladders and grabirons on the end of said car, as to enable brakemen to go from one car to the other in safety. The court instructs the jury that by reason of that allegation the jury are not authorized to consider any car in the train, except the tank car and the refrigerator car heretofore referred to.

47.

"It is further alleged in said complaint that the defendant was guilty of negligence in placing the oil car next to the refrigerator car, knowing that the platform or walk-way on the oil car was six or seven feet lower than the top of the refrigerator car. The court instructs the jury that this allegation is immaterial and the plaintiff cannot recover, even though the proof should show that the defendant knowingly placed said cars together without adding new handholds, ladders or grabirons other than those which are shown by the testimony to be upon said cars.

48.

"The court instructs the jury that there is no duty owing from the defendant to its brakemen to make up the train with said cars in any specific or certain arrangement. The defendant is only required to use ordinary care in making up said train, and if it is customary and usual among railroads to place a tank car like the National Zinc Car, next to a refrigerator car like the S. F. R. D. car, then the placing of that car at that place would not be negligence.

49.

544 "The court also instructs the jury that it will not be proper in this case for counsel for the plaintiff to urge upon the jury that the defendant could have placed a coal car or a flat car or a car of a different height from the tank car, next to the refrigerator car, and to urge upon the jury that it was negligence not to do so.

50.

"It is alleged in the complaint that the defendant, by placing the tank car next to the refrigerator car, because of the inequality in the height of said cars, increased the danger to the brakemen in passing from the refrigerator car to the tank car. The court instructs the jury that the plaintiff cannot recover upon that allegation in the complaint.

51.

"It is also alleged in said complaint that the defendant was further negligent in permitting to go into this train and to be handled therein, any car that was not furnished with handholds, and grabirons on the end thereof, so as to enable the brakemen to safely pass from one car to another car. The court instructs the jury that that allegation is indefinite and uncertain, and the plaintiff is not entitled to recover thereon.

52.

"It is alleged in the complaint that the engineer of the defendant permitted his air to become out of order, meaning it is assumed, that the air brake appliances were out of order. The court
545 instructs the jury that the plaintiff is not entitled to recover by reason of any allegation that the engineer of the defendant permitted his air appliances to get out of order.

53.

It is alleged in the complaint that the deceased was a brakeman and that he was unable to and did not appreciate any dangers arising from the handholds, grabirons and other appliances on the cars. On that point the jury are instructed that the deceased is presumed to have information of the two cars where he had been working. While it may not have been his duty to make a specific examination of said cars, yet if the appliances on said cars were in plain view

from the time the train left De Queen, and if said tank car and said refrigerator car were in the train, and if the deceased was continuously working along and over said cars, and if the appliances, including the handholds, ladders and grabirons, on said cars, were plain and easily seen, and were open and obvious, the deceased must be held to have known of the construction and make up of said car, and especially so if in the use of said cars he would reasonably and necessarily acquire knowledge of the appliances on said cars.

"The deceased is presumed to have had reasonable and fair intelligence and to have had sufficient intelligence to perform the work of a brakeman upon which he entered. If he had been in the service of the defendant and other railroads in that kind of work for five months or more, and if he had reasonable intelligence, he is presumed to have known what his duties were, and to have entered upon the discharge of those duties with the knowledge necessary to perform the same. The plaintiff has introduced no proof that the deceased was not of fair and average intelligence and therefore he is conclusively presumed to have had average intelligence and ability.

54.

"The deceased, Leslie Old, in accepting and continuing in the employment for which he was engaged as brakeman, assumed all of the ordinary and usual risks and perils incident thereto; he assumed all of the obvious risks of the work in which he was engaged, and also the risks he knew existed as well as those which, by exercise of reasonable care, he might have known existed. By his contract of service with the defendant, he agreed to bear the risk of all such dangers, and if his death resulted from any one of such dangers, plaintiff cannot recover in this action.

55.

"It is the law, gentlemen, that where an employee knows the methods that are adopted in doing the work for which he is engaged, and the place furnished in which the work is to be done, and accepts or continues in the employment under such conditions although they may involve greater danger than would other conditions and place for work, he assumes the risks of the dangers that may result therefrom, and there can be no recovery for the death or injury thereby occasioned.

56.

"You are instructed that the mere fact that the deceased was killed at the time and place alleged in plaintiff's complaint does not warrant a recovery of defendant, and in order for the plaintiff to recover against the defendant, it is necessary for the plaintiff to go further and show by a preponderance of the testimony, that said defendant company was not guilty of the negligence alleged in the complaint, but that said negligence di-

rectly caused the death of plaintiff's intestate, and if the evidence fails to show this, then it is your duty to return a verdict for the defendant.

57.

"If the evidence in this case fails to establish to your satisfaction the negligent manner in which the deceased was killed, as alleged in the complaint, then the court tells you as a matter of law, that you can not presume negligence on the part of the defendant company, and that it would be your duty to return a verdict for the defendant.

58.

"It is alleged in the complaint that, had the defendant equipped these cars with handholds or ladders on the end thereof, or had it placed in the makeup of said train a car next to the tank car that was equipped with handholds and ladders on the end thereof, the deceased would not have been injured. The court instructs the jury that that allegation is immaterial, and that the plaintiff cannot recover thereon.

548

59.

"It is alleged in the complaint that if the tank car had had any ladders thereon, the plaintiff would have gone onto said tank car in safety. The court instructs the jury that that allegation is immaterial, and that the plaintiff cannot recover thereon. The plaintiff cannot base a recovery upon what might have happened, but the verdict must be based upon the evidence as it is.

60.

"It is alleged in the complaint that the absence of ladders or handholds on the end of the box cars and the tank car concurred with the unusual and violent jerking of the train, and thereby caused the deceased to be injured. The jury are not entitled to infer that said alleged acts of negligence, if they were negligence, under the instructions heretofore given, concurred in producing the result complained of. Before the jury can find that they concurred, there must be evidence tending to show such concurrence. The jury cannot conjecture on that subject.

61.

"It is alleged in the complaint that the deceased was thrown between the ends of the tank car and the refrigerator car next thereto. The court instructs the jury that they cannot find for the plaintiff on any other theory than that. In other words, if the deceased was injured by an attempt to get on to the train or by reason of some unknown cause, the plaintiff cannot recover. The plaintiff cannot recover except upon proof that the deceased fell between said

549 tank car known as National Zinc car numbered 17 and S. F. R. D. car numbered 6239. If he was injured in any other way, the plaintiff cannot recover. If the jury are in doubt as to

whether he was injured in some other way, or as to whether he was injured in that way, they must find for the defendant.

62.

"It is also alleged in the complaint that there were no ladders or grab irons or handholds on the end of the refrigerator car. The court instructs the jury as a matter of law that it was not necessary to have ladders, grab irons or handholds on that part of the end of the refrigerator car which was next to the oil car. The defendant completely complied with the law if it placed handholds on the side of said refrigerator car at a place near the end and where railroad companies customarily place such handholds in the construction of similar cars.

63.

"If the jury finds from the evidence that the constructors or manufacturers of some of these refrigerator cars placed hand holds or grab irons or ladders on the extreme end, that fact, if it be a fact, that the ladders or grabirons or handholders in this particular car were not placed on the extreme end is no evidence whatever of negligence in the placing of said ladders or handholds or grabirons. The defendant had a right to place same in either of two places where the railroad companies and manufacturers of said cars customarily place them,—at one place or the other. The fact that they were placed under such circumstances on the side of the refrigerator car and near the end is no evidence of negligence as defendant had the absolute right to place them at that place or to place them on the extreme end of the car, as it saw proper.

64.

"It is alleged in the complaint that the defendant had not provided the end of the refrigerator car with ladders or grabirons or handholds so as to enable its brakemen to get safely from the top of the refrigerator car on to the platform or floor of the oil car. The court instructs the jury, as a matter of law, that the defendant had the right under the law and the Acts of Congress heretofore referred to, to place said ladders or grab irons on the side of the refrigerator car and near the end of same, and so placing them in compliance with the law and is not an act of negligence, even though it should be more dangerous to have them placed on that side near the end than it would be if they were placed on the end of said car.

65.

"It is alleged in the complaint that it was necessarily dangerous for the grabirons, handholds or ladders to be placed on the side of said refrigerator car and near the end thereof. The court instructs the jury that even if the proof shows that it was necessarily dangerous to have said ladders so placed, that would not authorize the jury to find that the defendant was guilty of negligence in using a car with the ladders so placed.

551

66.

"It is also alleged that the absence of grab irons or hand holds, or ladders at the end of the refrigerator car made it unnecessarily hazardous for the brakeman to pass from the top of said refrigerator car to the walk-way on the oil car. The court instructs the jury as a matter of law that if it is a customary practice of all railroads to place the hand holds or grab irons or ladders on the side of the end of the car and not on the extreme end, then it would not be actionable negligence for the defendant to use a car with the ladders, grab irons or hand holds on the side thereof. Even if the jury should find that it was more hazardous to have the grab irons on the side of the car, still that fact would not authorize a recovery.

67.

"It is also alleged that there were no grab irons or hand holds on the end of the oil car immediately in front of the refrigerator car. The court instructs the jury as a matter of law that the absence of hand holds on the oil car immediately in front of the refrigerator car, is not negligence, and proof of that fact would not entitle the plaintiff to recover in this case.

68.

"It is alleged in said complaint that just before the said train reached the station of Page, the air in said train failed to work properly, and that for that reason, the train could not be handled and controlled properly. Even if the proof tends to show that such fact, if true, would not authorize the plaintiff to recover in this action.

552

69.

"It is alleged in said complaint that when said train began to move out of the station of Page, the train—either because of the defective condition of the air, or because of the negligence of the engineer in manipulating the air, jerked and swayed violently and unusually, and so continued until plaintiff was injured. The court instructs the jury, under the allegation, that it is not sufficient and will not authorize the plaintiff to recover if the proof does not show what caused the plaintiff's injuries. It is not a sufficient allegation of negligence to show that one of two acts resulted in the injury to the deceased. The defective condition of the air might or might not have produced the injuries complained of, and the engineer might or might not have negligently operated the train. If the plaintiff relies upon one or both of these acts of negligence, proof must be introduced to show that such alleged negligences are true and that they caused the accident. It is not sufficient to introduce evidence tending to show that one or the other might have caused the accident. The jury are not permitted to conjecture that one or another cause might have caused the accident. Before plaintiff can recover he must show that the causes alleged did actually cause the injury, and that deceased was, himself, at the time, in the exercise of due care.

70.

"If the jury find from the evidence that the engineer negligently manipulated the air, and if the train by reason thereof, jerked and swayed violently, these facts, if true, would not authorize
553 a finding in favor of the plaintiffs. On that point, before the plaintiffs could recover, it must be proven by a preponderance of the evidence, that the engineer did manipulate the air negligently and that the engine thereby jerked and swayed and that the jerking and swaying of the train violently, caused deceased to fall. If the train was jerking and swaying violently and if that movement of the train did not produce the fall of the deceased, plaintiffs would not be entitled to a recovery, even though the air on the engine was out of repair. Even if the engineer manipulated the air negligently and carelessly if there is no connection between that and the alleged negligence and the falling of the deceased, there can be no recovery.

71.

"It is alleged in the complaint, that the deceased, in attempting to pass from the top of the box car to the oil car, and while in the discharge of his duty as a brakeman, he was either thrown from the car or he fell between the ends of the refrigerator car and the oil car. The court instructs the jury, as a matter of law, that the plaintiff will not be permitted to recover upon an allegation that he either fell from the car or was thrown therefrom. The falling might or might not have been due to any negligence of the defendant, and the mere fact that he fell, without proof as to the cause of his fall, is not sufficient to support a verdict in favor of the plaintiffs. Before the plaintiffs can recover on that allegation, they must prove that he fell by reason of the negligence alleged. If his falling
554 could have as well been due to the usual and ordinary jerks and jars of the train, the jury will not be permitted to conjecture that it was due to negligent handling, or the absence of ladders and hand holds as heretofore described.

72.

"The law presumed that the master, who is the defendant in this case, has performed its duty. The occurrence of the accident and the injury to the deceased, are not sufficient to authorize a recovery. It is not sufficient to show that the ladders were not in the proper place and that it was dangerous to pass from the refrigerator car to the oil car and that there were jerkings and violent swayings of the train at the time deceased fell. The jury will not be permitted to conjecture that his falling was due to any one of the alleged negligences which are set up in the complaint, nor will the jury be permitted to conjecture that his injuries were due to all of said negligences. Before the jury can find that the injuries were due to the negligent acts alleged, there must be proof to show that the fall of the deceased and his consequent injuries were actually due to one or more of the causes alleged.

73.

"It is also alleged in the complaint that the defendant maintained an inspector at De Queen, whose duty it was to make careful inspection of all cars composing its trains. It is not alleged in the complaint that a failure to inspect resulted in deceased's injuries. The jury are, therefore, instructed that the matter of inspection is not in the case at all.

555

74.

"It is alleged in the complaint that it was the duty of the defendant company to have the end of its cars equipped with sufficient handholds, ladders or grabirons, as would enable the brakemen to go safely from one car to another in the discharge of their duties, without exposing themselves to hazards and dangers. The court instructs the jury that there is no such duty upon the defendant in this case.

75.

"It is also alleged that it is usual and customary among well regulated railroads to equip their cars with such handholds or ladders or grabirons on the ends of said cars, to enable the brakemen to discharge their duties without hazards or dangers. The court instructs the jury that there is no such duty upon the defendant, or other railroads. All that the law requires of the defendant is the exercise of ordinary care in preparing proper appliances. There is no duty requiring the defendant to put its grabirons or handholds or ladders at any particular place on said car. Nor is it customary to require said brakemen to go from car to car in any specific manner or method.

76.

"It is further alleged in the complaint that defendant failed to exercise ordinary care in having its cars in said train equipped with handholds, ladders or grabirons on the ends of said cars. The court instructs the jury as a matter of law, that defendant is not required under the law to have the ends of the cars equipped with handholds, ladders or grabirons.

556

77.

"It is also alleged in the complaint that the defendant was negligent in placing the oil car next to the refrigerator car. The court instructs the jury that plaintiff cannot recover on that allegation. The law does not require the platforms of the oil cars to be on a level with the running board of the refrigerator cars. Nor does it require ladders between said cars, and only requires the exercise of ordinary care in placing handholds or ladders or grabirons at certain places, which will permit brakemen to pass from one car to the other, and where same can be used in the exercise of ordinary care in passing from car to car.

78.

"It is further alleged in the complaint that the defendant was negligent in permitting to be hauled in its train a refrigerator car which had no handholds on the end thereof. The court instructs the jury as a matter of law that plaintiff cannot recover on that allegation.

79.

"It is also alleged in the complaint that the engineer of the defendant was negligent in permitting the air to become out of order. The court instructs the jury that the plaintiff cannot recover on that allegation.

80.

"It is also alleged in said complaint that the engineer of the defendant was negligent in permitting his air to get out of order or negligent in manipulating the air. The court instructs the jury that the plaintiffs are not entitled to recover upon alleging 557 negligence in the alternative. The allegation in the complaint must be specific, clear and casual to authorize a recovery.

81.

"It is also alleged in the complaint that, had the defendant equipped its cars with handholds or ladders or grabirons, on the ends thereof, the deceased would not have fallen. The court instructs the jury that there can be no recovery on that allegation.

82.

"If the jury find, from the evidence, that the deceased was engaged in a quarrel or was having trouble with the station agent, and if the deceased, in pursuing the said quarrel, secured a rock and threw same through *same through* the window of the station building, and if, by reason of those acts he waited until the train was running at a high rate of speed, and then attempted to get on, and on that account was injured, he cannot recover.

83.

"If the deceased was at the time of his accident neglecting his duty and if he delayed getting on said train — it was in slow motion and while in his desire to attempt to punish the station agent, and for those reasons he did not get on the train while at the station, and if, for those delays, he attempted to get on the train while it was in rapid motion, and was on that account injured, he cannot recover.

84.

"If Leslie Old, the deceased, was engaged in a quarrel and was in a difficulty with agent Tucker, and if said Old because of throwing a rock into the window of the station house, lost his balance and fell and was injured, the plaintiff cannot recover.

558

85.

"If Leslie Old, the deceased, in attempting to get on said train while same was in motion, and if he in attempting to board said train and failed to catch the train and slipped and fell and thus came to his death, plaintiff cannot recover.

86.

"If the deceased, Leslie Old, in attempting to board said train slipped and fell and was injured, plaintiff cannot recover.

87.

"If the jury are unable to determine from the evidence, whether the death of Leslie Old, the deceased, was due to the absence of end ladders on said cars, or to negligent and unusual jerks in said train, if there were such, or to other negligence, alleged in the complaint, then the jury must find for the defendant.

88.

"Under the Interstate Commerce Act of Congress and the amendments thereto and the regulations made in pursuance thereof, all railroads have until July 1, 1916, to place handholds or ladders on the ends of cars, and therefore it is not negligence herein which would entitled plaintiff to recover, for defendant to have said refrigerator car and tank car without having end ladders or grabirons, even though the jury should find that it was safer to the brakemen to have the end ladders, and even though it should appear that a majority of refrigerator and tank cars have end ladders now.

89.

"If the jury find from the evidence that there are some tank cars in use which are so constructed as to have an end ladder at the end thereof, that fact does not prove or tend to prove, that it was
559 negligent for defendant to have in said train a tank car without such end ladder, and the plaintiff is not entitled to recover herein upon that proof.

90.

"If it was more dangerous for the brakemen to go from a refrigerator car to a tank car than to go from the refrigerator car to a coal or other car, that fact, if proved, did not impose upon the defendant, the duty to place some other car next to the refrigerator car. Under the Interstate Commerce Act of Congress and the amendments thereto, and under the rules and regulations of the Interstate Commerce Commission which have the force and effect of law, and which are law, the defendant had the right to make up and have said train with the tank car next to the refrigerator car, and so hauling said cars is not negligence, and cannot be made the basis of a recovery herein, even if it be true that it was more dangerous to

place said cars than to place a coal car or some other car next to said refrigerator car.

91.

"Even if it be true that fifty per cent or more of refrigerator cars in service of all railroads are equipped with end ladders, that fact does not make it the duty of this defendant to refuse to haul said refrigerator car, nor does that make it negligent for defendant to haul said car, nor does that fact, if true, give the plaintiff a right to recover herein.

92.

"If the jury are unable to determine from the evidence, whether the death of Leslie Old, was due to the negligence of the defendant, or to his own negligence in attempting to get on the train or in throwing the rock or to some unknown cause, they must find for the defendant.

560

93.

"If Leslie Old got on the train south of the station, and from the top of the car threw the rock and lost his balance and was injured by falling, or if he got on the train and then got down on the ground and threw the rock and in an attempt to reboard the train slipped, and fell and was injured, the plaintiff cannot recover. Or if he threw the rock and thus delayed getting on the train, and then attempted to get on and slipped and fell, plaintiff cannot recover, or if he did neither of the above acts, but was injured because he slipped and fell in an attempt to get on the train, plaintiff cannot recover.

94.

"The court instructs the jury that the defendant in this case alleges that the injury to the deceased was due to a risk which the deceased assumed, and that it was not due to any negligence of the defendant. If the deceased voluntarily worked with said National Zinc Car numbered 17, and said S. F. R. D. car numbered 6239, having worked with the same during the day and afternoon, and if he realized their dangers, then he assumed the risk due to such dangers, if they existed, and having done this, if he did, he cannot recover. In other words, if the deceased, with knowledge of the kind of cars he was required to use, and with knowledge of the kind of ladders on said cars, and with knowledge of the condition of the air brake appliances, and understood and appreciated the dangers thereof, if any, worked on the same, and with the same, and was injured by reason of those conditions, then he assumed the risk, and the plaintiff cannot recover in this action.

95.

561 "If the jury should find the issue for the defendant, it will then be the duty of the jury to determine the amount of damages, if any, to which plaintiff will be entitled to recover. Under the Act of Congress of April 22nd, 1908, and the amendments

thereto of April 5th, 1910, the plaintiff is not entitled to recover for any pain and suffering, either mental or physical.

96.

"If Leslie Old, the deceased, was not guilty of negligence, and if the defendant was guilty of negligence as herein defined, and if the plaintiff under the instructions heretofore given is entitled to recover, the jury may consider any right of action if any, which the deceased would have had, if he had lived. However under the Act of Congress of April 22nd, 1908, and the Act of Congress of April 5th, 1910, under which the plaintiff brings this action, the plaintiff is not entitled to recover damages for the loss of the support and maintenance which the widow and child of Leslie Old would have received if he had lived, and in addition thereto to recover an additional sum as damages that might have been due to Leslie Old, had he lived. Under said Acts of Congress, only one recovery can be had, and that recovery, if plaintiff is entitled to such recovery, must be limited solely and exclusively to the loss which the widow and child of the deceased will suffer by reason of the death of said Leslie Old. Under said Act of Congress, the plaintiff is not entitled to recover damages for the loss of the husband and father of said widow and child, and then in addition thereto, the damages which said Leslie Old, could have recovered if any, if he had lived. If the defendant was guilty of negligence as herein outlined, the plaintiff is entitled to one recovery only, and the amount of that recovery must be limited to the loss which the widow and child of

562 said Leslie Old have sustained by reason of his death, and in arriving at that amount, the jury may consider whether said Leslie Old would have recovered any sum had he lived, but cannot under said Acts of Congress ascertain that sum and then add it bodily to an additional sum growing out of the loss to the widow and child of the husband and father.

97.

"Under said Acts of Congress referred to in the last instruction, and under amendment numbered 5 of the Constitution of the United States, and under Section 1 of the 14th amendment to the Constitution of the United States, the plaintiff is not entitled to recover, if at all, any sum for any cause of action which the deceased might have had if he had lived. Under said Acts of Congress, and under the Constitution and under said sections of the Constitution of the United States, the plaintiff can only recover whatever damages the widow and child have suffered by reason of the negligent killing of Leslie Old, if he was negligently killed by the defendant.

563

Plaintiff's Instructions.

Of the above, the court refused to give the following numbers: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 44, 45, 46, 47, 48, 49, 51, 52, 53, 55, 58,

59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97.

The defendant saved a separate and several objection to the action of the court in refusing to give each of said instructions that were refused by the court. The said exception was not taken in gross, but was made separately and severally to the refusal of the court in refusing each of said instruction.

Of the above instructions requested by the defendant, the court gave the following: 27, 42, 43, 54, 56, 57, 94.

Upon motion of the plaintiff, the court instructed the jury as follows:

No. 1. You are instructed that the uncontradicted testimony in this case shows that at the time of his injury, plaintiff's deceased was engaged by the defendant on an interstate train as a brakeman on said train and was engaged in interstate commerce. In such cases, the law provides among other things that every common carrier by railroad, while engaged in interstate commerce, shall be liable in damages to every person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his personal representative for the benefit of the surviving widow or children of such employee for such injury or death, resulting in whole or in part from the negligence of
564 any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, etc. Therefore if you find from a preponderance of the evidence that deceased's injury and death was caused in whole or in part by the negligence of the defendant, or any of its employees as set out in the complaint, you will find for the plaintiff, unless you further find the deceased assumed the risk or was guilty of such contributory negligence as will bar a recovery as hereinafter explained.

No. 2. You are instructed that it was the duty of the defendant to inspect all the cars put into its train before the train was started on its trip, and it was the duty of the inspector to see that the cars put into the train were properly equipped with such safety appliances as you may find from the evidence were in common use by the railroads in this section of the country and necessary to prevent exposing the brakemen to unusual and unnecessary hazards in going from car to car while the train was in motion. If you find from the evidence that grab irons, hand holds or ladders on the ends of the freight cars for the use of the brakemen going from car to car while the train was in motion, in the discharge of their duties, were commonly and generally used by the railroads in this section of the country, and that the same are necessary to enable the brakemen to go from car to car while the train is in motion in the discharge of their duty, without unusual and unnecessary hazards, and that the defendant permitted a car without adequate equipment of such grab irons or ladders to be put in its train and that the injury
565 and death of plaintiff's deceased was caused in whole or in part from the lack of such equipment, then the defendant is liable in this case, unless the deceased assumed the risk

thereof or was guilty of such contributory negligence as will bar a recovery as hereinafter explained.

2½. Negligence is the doing of something which a man of ordinary prudence would not do, or the failure to do something which a man of ordinary prudence would do under similar circumstances.

No. 3. If you find from a preponderance of the evidence that decedent was injured in attempting to pass from the refrigerator car onto and over the tank car, as set out in the complaint, and if you further find, that in making up of said train, a person of ordinary caution and prudence, in the exercise of ordinary care, would have placed cars on either end of said oil or tank car, equipped with such appliances as would have materially lessened the hazards or danger in passing onto and over said tank car and that defendant, in the exercise of ordinary care could have done so and negligently failed to do so and that such failure in whole or in part was the cause of decedent's injury and death, then you will find for the plaintiff, unless you further find that decedent assumed the risk of said danger or was guilty of such contributory negligence as will bar a recovery as hereinafter defined.

No. 4. If you find from a preponderance of the evidence that the employees of the defendant company in charge of defendant's train at the time of decedent's injury, carelessly and needlessly permitted the train to jerk or lurch violently and unusually and unnecessarily hard while said train was passing out of Page and that this jerking and lurching could have been prevented by the exercise of ordinary care on the part of said employees, and if you further find that said jerking and lurching was the cause either in whole or in part of the deceased's injury and death, then you will find for the plaintiff.

No. 5. If you find from a preponderance of the evidence that decedent received his injury and death on account of the negligence of the defendant in either of the respects set forth in the preceding instructions, if you find there was negligence of the defendant in either respect set forth, or a concurrence of the alleged acts of negligence, then the defendant is liable unless decedent assumed the risk or was guilty of such contributory negligence as will defeat a recovery as hereinafter defined.

No. 6. While an employee assumes all the risks ordinarily incident to his work, yet he does not assume the risk of negligence on the part of the employer or the employer's other servants. If the employer or its other servants negligently failed to perform their duties to an employee, then their negligence in such respect is not a risk assumed by the employee, unless he continues in such employment with a full knowledge of such negligence, and appreciates the danger arising therefrom.

No. 7. You are further instructed that if you find from the evidence that decedent was himself guilty of any negligence which contributed to his injury and death; provided you find the defendant liable, such negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to the decedent.

No. 8. In determining whether the decedent was guilty of
567 a contributory negligence, you must determine whether under all the circumstances presented to him at that time, he acted as a man of ordinary prudence and care would have acted. If the act of the deceased in going from one car to another while the train was in motion was dangerous and the danger was known and appreciated by him, and is one of which many men are in the habit of assuming and prudent men are earning a living in work, exposing them to these risks, then, one who assumes the risks cannot be said to be guilty of contributory negligence if having in view the risks assumed he uses care reasonably commensurate with the risk to avoid injurious consequences.

No. 9. You are instructed that it devolves upon the plaintiff to establish not only the negligence complained of, but that such negligence was the cause of the injury. This causal connection must be established by evidence as a fact and not to be left to mere speculation and conjecture. This rule, does not however require that there must be direct proof of the fact itself, but it may be established by circumstantial evidence, that is by such facts and circumstances of such a nature and such connection and relation to each other, that the conclusion therefrom may be fairly and reasonably inferred.

No. 10. If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the
568 pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff.

The defendant objected to the giving of each of said instructions on motion of the plaintiff. Said defendant saved a separate and several objection to each of said instructions and the said objections are fully set out in the transcribed notes of the evidence above. Said defendant's objections were made separately and severally to each of said instructions given on motion of plaintiff, and said objections are found on pages 294 to 298 of the transcribed notes of the evidence above set out.

Court's Instructions.

The court on his own motion instructed the jury as follows:

1. In the outset, you are instructed that the burden of proof is

upon the plaintiff to prove the manner and cause of the death sued for, and that it resulted proximately; that is, directly from one or more of the alleged acts of negligence in the complaint.

If from the evidence it appears equally that it may have, or it may not have been, caused, as alleged in the complaint, then it is not necessary to go further, plaintiff in that event could not recover, and you should find for the defendant.

2. If the jury should find that the death of deceased
569 resulted from an unavoidable accident, or from his own negligence alone, or occurred from the negligence of the defendant other than the negligence alleged in the complaint, then the plaintiff would not be entitled to recover, and your verdict should be for the defendant.

3. You are instructed that negligence cannot be inferred from the mere happening of an accident, and that if the circumstances relied upon by the plaintiff to show negligence in this case are consistent with ordinary care on the part of the defendant, then the charge of negligence will fail for want of proof, and in that case you will find for the defendant.

4. You are instructed that the mere fact that the deceased was killed at the time and place alleged in plaintiff's complaint, does not warrant a recovery, and in order for plaintiff to go further and show by a preponderance of the evidence that said defendant company was not only guilty of the negligence alleged in the complaint, but that said negligence proximately contributed to the death of plaintiff's intestate, but if the evidence fails to show this, then it is your duty to find for the defendant.

5. If the evidence in this case fails to establish to your satisfaction the negligent manner in which deceased was killed, as alleged in the complaint, then the court tells you, as a matter of law, that you cannot presume negligence on the part of the defendant company and that it would be your duty to return a verdict for the defendant.

6. The deceased, Old, in accepting and continuing in the employment for which he was engaged as brakeman, assumed all ordinary
and usual risks and perils incident thereto; he assumed all
570 the obvious risks of the work in which he was engaged and also the risks he knew existed, as well as those, which, by the exercise of reasonable care, he might have known existed.

7. By his contract of service with the defendant he agreed to bear the risk of all such dangers, and if his death resulted proximately from any one of such dangers plaintiff cannot recover in this action.

8. It is the law that where an employee knows the methods that are adopted in doing the work for which he is engaged and the place furnished in which the work is to be done, and knows and appreciates the dangers thereof, if any, and accepts and continues in the employment under such conditions, although they may involve greater danger than would other conditions and places for work he assumes the risks of the dangers that may result therefrom, and there can be no recovery for the death or injury thereby occasioned.

The defendant objected to each of said instructions given by the court on his own motion, and saved a separate and several exception to the giving of each of said instructions. The defendant's objections and exceptions to each of the instructions given on motion of the plaintiff, and on the court's own motion were not taken in gross, but were made separately and severally to each of the instructions given, and said exceptions are set forth in the transcribed notes of the evidence as above shown on pages 294 to 298.

The above and foregoing contains all of the instructions that were requested, refused and given. After the giving of said instructions, the jury retired to consider their verdict, and after due consideration, returned into court the following verdict, to-wit:

571

Verdict.

"We, the jury, find for the Plaintiff and assess the damages at (\$25,000.) Twenty Five Thousand Dollars."

L. F. WHEELIS, *Foreman.*

572

Thereupon, and within the time allowed by the court, and by the law, the defendant filed in open court a motion for a new trial, which motion is in words and figures as follows:

573

In the Little River Circuit Court.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
Plaintiff,

VS.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes the defendant, and moves the court for a new trial herein upon the following grounds, to-wit:

1.

The court erred in overruling and denying the petition of the defendant, for a removal of this cause to the United States Court.

2.

The court erred in holding that this cause could not be removed.

3.

The court erred in overruling the motion of the defendant to strike out certain parts of the complaint.

4.

The court erred in overruling the motion of the defendant to require the plaintiff to make his complaint more definite and certain.

5.

The court erred in overruling each part and division of the motion to strike out certain parts of the complaint, each division or part of said motion being in itself a separate motion.

574

6.

The court erred in overruling the demurrer to the complaint.

7.

The court erred in overruling the motion of the defendant for a continuance of this cause, which motion was in writing.

8.

The court erred in overruling the defendant's motion made orally, based upon the ground of surprise by reason of plaintiff amending the complaint as to the allegations leveled against the tank car.

9.

The court erred in overruling defendant's objection to the introduction of any testimony in the cause.

10.

The court erred in permitting W. P. Feazel, counsel for the plaintiff, in his opening statement, to say to the jury that the trainmen had had trouble with this train before it arrived at Page.

11.

The court erred in permitting the same counsel to say to the jury in his opening statement, that a knuckle on one of the cars got out of order.

12.

The court erred in permitting the same counsel in his opening statement to say to the jury that railroads generally had end ladders.

13.

The court erred in admitting in testimony the letters of administration.

14.

575 The court erred in admitting over defendant's objection, the evidence of Harry Eames, as to the reasons why cars were set out at Howard and other places before arriving at Page.

15.

The court erred in permitting said Harry Eames to testify as to the existence of trouble on a car which was set out at Howard.

16.

The court erred in permitting Harry Eames to state the conversation between him and Leslie Old before the train arrived at Page.

17.

The court erred in permitting said Harry Eames to testify in substance, that he did not know what became of Leslie Old, if the latter did not get on the train.

18.

The court erred in permitting counsel for the plaintiff to ask Harry Eames a hypothetical question, in substance stating "assuming that it was Leslie Old on top of the refrigerator car, did you see him any more?"

19.

The court erred in permitting counsel for the plaintiff to ask Harry Eames any questions upon the assumption, or assuming that Leslie Old was upon top of the train.

20.

The court erred in permitting Harry Eames to testify that if Leslie Old did his duty he would go forward, and would pass over the distance between the refrigerator car and the tank car.

576

21.

The court erred in permitting Harry Eames to testify that if Leslie Old went forward to discharge his duty, he would pass over the space between refrigerator car 6239 and National Zinc car No. 17.

22.

The court erred in refusing to permit Harry Eames to detail the conversation between agent Tucker and Leslie Old.

23.

The court erred in permitting Harry Eames to testify to the effect that the coal cars were open top cars, and that there were a number of coal cars in the train.

24.

The court erred in permitting said Harry Eames to give any testimony as to the appliances, mechanism, size or dimensions of said coal cars.

25.

The court erred in permitting L. S. Monroe to testify as to the duties of a brakeman.

26.

The court erred in permitting L. S. Monroe to testify as to the trouble with the air on the car that was set out at Howard before arriving at Page, and as to any other trouble with the air before the train arrived at Page.

27.

The court erred in permitting said L. S. Monroe to testify that the air on some of the cars before arriving at Page stuck.

28.

577 The court erred in permitting said L. S. Monroe to testify as to the effect of the sticking of the air brakes on the train at Mena.

29.

The court erred in permitting said L. S. Monroe to testify as to what is known as a dynamiter car in the train, and as to trouble growing out of the same at Mena.

30.

The court erred in permitting Charles W. Black to testify that he was called upon by the company to make an examination of the cars at Heavener, after the death of Leslie Old.

31.

The court erred in permitting said Charles W. Black to testify as to what was indicated by the cutting off of the engine.

32.

The court erred in permitting Charles W. Black to testify that he supposed the train he examined was the one on which Leslie Old was killed.

33.

The court erred in permitting said Charles W. Black to testify as to what he was told to do, and also as to what he found as to the hand holds.

34.

The court erred in permitting Charles W. Black to testify as to the number of handholds on refrigerator car No. 6239, and on National Zinc car No. 17.

35.

578 The court erred in permitting said Charles W. Black to testify as to the provision made in such cars to enable brakemen to get from one car to another.

36.

The court erred in permitting the witness A. C. Holt to testify that in his opinion there were unusual jerks of said freight train.

37.

The court erred in permitting said A. C. Holt to testify that he thought the train was off the track.

38.

The court erred in permitting said A. C. Holt to testify in substance that he, Holt, could tell from what Leslie Old said, that Leslie Old was conscious.

39.

The court erred in refusing to permit said A. C. Holt to detail the conversation which he had with said Leslie Old.

40.

The court erred in permitting said A. C. Holt to testify that Leslie Old talked rationally up to thirty minutes before his death.

41.

The court erred in permitting said A. C. Holt to testify that no medicines for the relief of the deceased was administered to him after the accident.

42.

The court erred in permitting said A. C. Holt to testify as to what was said by Leslie Old to A. C. Holt without telling all that was said.

43.

579 The court erred in permitting the witness, O. C. Buschow, to testify and give his opinion that the train moved out with violent or unusual jerks.

44.

The court erred in permitting witness E. Maggard to testify in substance and give his opinion, that the train moved out with jerks that were a little unusual.

45.

The court erred in permitting the witness R. L. Bailey to testify as to the jerking of said train.

46.

The court erred in refusing to permit said R. L. Bailey to testify that he gave whiskey to Leslie Old.

47.

The court erred in permitting Frank Sweeney to testify as to the railroads in the country having end ladders on cars, and as to the proportion of cars with end ladders.

48.

The court erred in permitting said Frank Sweeney to testify that 75% of the refrigerator cars of the country were equipped with end ladders.

49.

The court erred in permitting said Frank Sweeney to testify that 50% of the cars of the railroads in the country had end ladders.

50.

The court erred in permitting said Frank Sweeney to testify that railroad cars had grabirons, and end ladders and hand holds, and not grab irons in certain instances.

580

51.

The court erred in permitting said Frank Sweeney to testify in substance, giving his opinion that it was safer to have end ladders on cars in order to enable the brakemen to go from one car to another, or to go from a high car to a low car.

52.

The court erred in permitting said Frank Sweeney to testify that it was safer in going from a high car to a low car, to have end hand-holds on the high car.

53.

The court erred in permitting said Frank Sweeney to testify that if there was no end ladder on the high car, the brakeman would have to turn his hold loose in order to reach the low car.

54.

The court erred in permitting said Frank Sweeney to testify that in going from a high car without end ladders, to a low car, it would be necessary to turn the high car loose before the brakeman could catch hold of the low car.

55.

The court erred in permitting said Frank Sweeney to give his opinion that cars with end ladders would be safer than cars without end ladders.

56.

The court erred in permitting said Frank Sweeney to testify and give his opinion that where the cars were equipped with end ladders, the brakemen in passing from one car to the other would be nearer to the low car, where the end ladders were used.

57.

581 The court erred in permitting the witness, Richard Lee, to testify and give his opinion, as to the proportion of cars used by railroads in the country, that are equipped with end ladders.

58.

The court erred in permitting said Richard Lee to testify that 50% of the cars used by railroads were equipped with grabirons and end ladders, and not handholds.

59.

The court erred in permitting said Richard Lee to testify as to the purpose of having end ladders and not handholds.

60.

The court erred in permitting said Richard Lee to testify, and give his opinion, that it was safer to have end ladders on cars generally.

61.

The court erred in permitting said Richard Lee to testify that with end ladders on the cars, the brakemen in passing from one car to another would have a shorter step to make.

62.

The court erred in permitting said Richard Lee to testify that it would be safer to come down the end ladder and cross over to the next car, than it would be to come down the side ladder and thus pass from one car to the other.

63.

The court erred in permitting said Richard Lee to testify as to the appliances that are attached to the tank cars to enable brakemen to pass to and from said cars in a train.

64.

The court erred in permitting said Richard Lee to testify that in case of oil cars, said cars had a ladder on the end thereof.

582

65.

The court erred in permitting said Richard Lee to testify and to give his opinion as to the length of service that would be required of a brakeman to enable him to become sufficiently experienced so that he would understand and know the dangers of the service.

66.

The court erred in excusing the jury on the morning of July 12th, and permitting them to separate and to engage in the trial of other cases, and then afterwards, to continue in the trial of this case, and the court erred in passing this case to July 17th for further trial.

67.

The court erred in proceeding with the trial of this cause before the same jury on the morning of July 17th, after said jury had been separated and had tried other causes.

68.

The court erred in permitting H. W. Hopson to testify as to the dangers incident to brakemen passing from one car to the other, and from refrigerator cars to other cars, where there were no end ladders on said cars.

69.

The court erred in permitting said H. W. Hopson to testify that nearly all refrigerator cars have end ladders.

70.

The court erred in permitting said H. W. Hopson to testify that refrigerator cars with end ladders were safer than refrigerator cars with side ladders.

71.

583 The court erred in permitting said H. W. Hopson to testify that oil cars or tank cars should have grab irons on the end thereof.

72.

The court erred in permitting said H. W. Hopson to testify that a brakeman could not make a safe landing from a refrigerator car to an oil car, where there was no end ladder on the refrigerator car.

73.

The court erred in permitting said H. W. Hopson to testify that it would take a brakeman eighteen months to three years to become an experienced brakeman.

74.

The court erred in permitting said H. W. Hopson to testify that a brakeman would not become an experienced brakeman in going from one car to another.

75.

The court erred in permitting said H. W. Hopson to testify that a brakeman, in passing from one car to another, would not examine the name or ownership of any of the cars.

76.

The court erred in permitting said H. W. Hopson to testify that tank cars without end ladders were dangerous.

77.

The court erred in permitting said H. W. Hopson to testify that refrigerator cars without end ladders were dangerous.

78.

The court erred in excluding from the jury on motion of the defendant, the evidence of said H. W. Hopson, to the effect that refrigerator cars without end ladders, and tank cars without end ladders were dangerous.

584

79.

The court erred in permitting said witness to testify that in case of a small oil car or tank car, there was greater difficulty to reach the grab irons of said car.

80.

The court erred in permitting said Hopson to testify that new refrigerator cars that are now being brought out, have end ladders.

81.

The court erred in permitting the witness R. Y. Segrest to testify as to the duties of a yard switchman.

82.

The court erred in permitting said R. Y. Segrest to testify that the duties of a brakeman and a yard switchman were the same.

83.

The court erred in permitting said R. Y. Segrest to testify that as to handholds, grab irons and ladders, box cars were the same as refrigerator cars.

84.

The court erred in permitting said R. Y. Segrest to testify that railroads had end ladders, and side ladders and certain other kinds of ladders.

85.

The court erred in permitting said R. Y. Segrest to testify that 60% of the cars of railroads in service, were equipped with end ladders.

86.

The court erred in permitting said witness to testify that oil cars were equipped with end ladders.

87.

585 The court erred in permitting said witness last named to testify that refrigerator cars and oil cars with end ladders were safer than the same kind of cars with side ladders.

88.

The court erred in permitting plaintiff's counsel to ask said last named witness leading questions, as to where his feet would be placed, and how they would be placed in coming down an end ladder.

89.

The court erred in permitting said witness to testify as to the length of time necessary to enable a man to become an experienced brakeman.

90.

The court erred in permitting said witness to testify as to the construction of a zinc car.

91.

The court erred in refusing to exclude and to strike out the evidence of said witness, on the subject of the construction of a zinc car, and as to its end ladders, and hand holds, and grab irons.

91.

The court erred in permitting said last named witness to testify that it was unsafe to pass from a refrigerator car to an oil car, where there were no end ladders.

92.

The court refused to exclude from the jury the evidence of said last named witness as to the necessity to have end ladders on refrigerator cars and oil cars.

93.

The court erred in permitting the witness W. J. Old to testify as to the length of service of Leslie Old in railroad work.

586

94.

The court erred in permitting the witness W. J. Old to testify as to the length of service of Leslie Old in railroad work.

95.

The court erred in permitting said W. J. Old to testify as to how Leslie Old was, compared with other boys as to intelligence and training.

96.

The court erred in permitting the widow of the deceased, Annie May Old, to testify in the case at all.

97.

The court erred in permitting said witness Annie May Old, to testify as to the earnings of Leslie Old.

98.

The court erred in permitting said Annie May Old to testify as to the personal expenses of Leslie Old.

99.

The court erred in permitting said Annie May Old to testify as to the reasons why the earnings of the deceased were larger some months than they were other months.

100.

The court erred in permitting the witness, L. S. Monroe to testify that the defendant kept a car inspector at De Queen in the State of Arkansas, and that it kept several car inspectors there to inspect cars that went into the trains, as those trains left that terminal.

101.

The court erred in permitting the witness, J. T. Monroe, to testify as to the duties of a car inspector.

587

102.

The court erred in refusing to permit said J. T. Monroe to testify that under the rules and regulations of the Interstate Commerce Commission the defendant could not exclude the National Zinc Company car and the refrigerator car in question from the train.

103.

The court erred in admitting in evidence the tables showing the expectancy of life of the deceased and of his widow.

104.

The court erred in overruling, at the conclusion of the plaintiff's evidence, the motion of the defendant, to direct a verdict in favor of the defendant.

105.

The court erred in refusing to permit the witness H. Tucker, to testify as to the details of the quarrel between Leslie Old and said H. Tucker, and erred in refusing to admit said testimony in the case.

106.

The court erred in permitting the witness H. Tucker to testify as to his reasons for resigning from the Frisco Railway Company.

107.

The court erred in refusing to permit the defendant to introduce the application of the deceased, Leslie Old, for a position with the defendant.

108.

The court erred in refusing to permit to be introduced that part of the application of Leslie Old, alleging that he had had two years' experience as a brakeman with the Memphis, Dallas & Gulf R. R. Co.

588

109.

The court erred in refusing to admit in testimony that part of the statement and application of Leslie Old offered in evidence, showing and reciting that said Leslie Old was well acquainted with the duties and dangers of the work upon which he was about to enter, and also that part of said statement which shows that E. S. Hill fully explained to said Leslie Old all the duties and dangers growing out of his work.

110.

The court erred in excluding from the evidence each part and all of said application of said Leslie Old, after the same had been duly recognized by his father as the statement and application of said Leslie Old.

111.

The court erred in excluding from the jury the statement of the witness A. C. Holt, to the effect that Leslie Old told him Holt, that he, Old, tried to catch the train and slipped.

112.

The court erred in excluding from the jury the evidence of G. A. Tucker, V. V. Blakely, E. B. Blakely and A. C. Holt, and other witnesses to the effect that the said Leslie Old soon after he was injured, and while he was still conscious, stated that he attempted to catch the train, and slipped and that the accident was due to his effort in catching the train, and in slipping, as he was trying to catch the same.

113.

The court erred in excluding from the jury, after the same had been introduced in evidence, all statements of the deceased, to the effect that he attempted to catch the train, and slipped and fell under it, and was thereby injured.

589

114.

The court erred in excluding from the jury the testimony of A. C. Holt, V. V. Blakely, E. B. Blakely and G. A. Tucker, to the effect that Leslie Old said that he was injured because he attempted to catch the train and slipped, said evidence being admissible on the additional ground to show that he was not in the exercise of due care.

115.

The court erred in refusing to permit C. W. Black to testify that under the rulings of the Interstate Commerce Commission, the defendant could not exclude National Zinc car No. 17 and S. F. R. D. car No. 6239 from the train in question.

116.

The court erred in refusing to permit the witness Charles N. Swanson and R. E. Coleman to testify that National Zinc Car No. 17, and S. F. R. D. car No. 6239 in every way complied with the law as it now is, and with the rulings of the Interstate Commerce Commission.

117.

The court erred in refusing to permit the witness J. Gutteridge, to testify that National Zinc car No. 17 and S. F. R. D. car No. 6239 complied in every way with the rules of the Interstate Commerce Commission, and also with the Safety Appliance Act of Congress.

118.

The court erred in permitting witness T. J. Clayton, to testify on cross-examination, that if there were violent jerkings and movements of the train, that said violent jerkings and movements could only have been caused by improper handling of the engine.

590

119.

The court erred in permitting counsel for the plaintiff to ask said last mentioned witness in substance the following question: "Assuming that there were lurchings and jerkings unusual, what in your opinion, would have caused them?"

120.

The court erred in permitting said witness and in requiring him to answer said last named question.

121.

The court erred in refusing to permit the defendant to prove by the witness- J. J. Richards, C. H. Miller and J. R. Saunders that National Zinc car No. 17 and S. F. R. D. car No. 6239 and all handholds, ladders and grabirons thereon were in sound and safe condition, and that said handholds, ladders and grabirons were placed on said cars as required by the Interstate Commerce law and the rulings of the Interstate Commerce Commission, and that said witnesses, as inspectors and representatives of the defendant could not under the rulings of the Interstate Commerce Commission exclude said cars from said train because no end ladders were on said car.

122.

The court erred in refusing to admit in testimony the rules and orders of the Interstate Commerce Commission on the subject of handholds, end ladders, grabirons, and similar appliances.

123.

The court erred in refusing to permit to be introduced the order of said Interstate Commerce Commission, extending the time until July 1st, 1916, in which all railroads were granted time until that date to add end ladders on all cars that did not now have the same.

591

124.

The court erred in permitting the witness Jim Coulter, to testify as to his efforts to pass from an S. F. R. D. car to a National Zinc car, and as to the trouble and difficulty in so doing.

125.

The court erred in permitting the witness R. L. Bailey, to testify as to said Bailey's motive in giving whiskey to Leslie Old.

126.

The court erred in admitting in testimony the deposition and each question and answer thereof of the witness Miller.

127.

The court erred in permitting the witness A. C. Holt to testify as to the conversation between him and H. Tucker as to the throwing of the rock.

128.

The court erred in permitting the witness Dr. York to testify, as said evidence was not in rebuttal, and was otherwise inadmissible.

129.

The court erred in overruling the motion of the defendant to direct a verdict in its favor, which motion was made at the conclusion of all the evidence.

130.

The court erred in refusing on motion of the defendant, instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, and each of them.

131.

The court erred in giving each of the instructions requested by the plaintiff, and numbered from 1 to 11 inclusive, and each of them.

132.

The court erred in giving on his own motion instructions numbered from 1 to 8 inclusive, and each of them.

133.

The verdict herein is excessive and is the result of passion and prejudice on the part of the jury, and is clearly and obviously excessive in amount.

134.

The verdict is contrary to the evidence and the law, and is not supported by any evidence whatever.

135.

The court erred in permitting W. P. Feazel, counsel for the plaintiff, to make an argument before the jury as to the cost of putting on grab irons, said counsel arguing that said cost was insignificant.

136.

The court erred in permitting the said counsel to argue that the defendant should have placed a coal car or other car next to the refrigerator.

137.

The court erred in permitting said counsel to argue and state to the jury in his closing argument that this jury had been —.

138.

593 The court erred in permitting said counsel to argue improperly the law as to the measure of damages, and to argue that the jury should multiply the amount received by the deceased less his personal expenses by the number of years of his expectancy.

139.

The court erred in permitting said counsel to argue the measure of damages in his closing argument, whereas he had not argued it in his opening argument.

140.

The court erred in not directing a verdict in favor of the defendant, because under the Employers' Liability Act of Congress of April 22, 1908, and the amendments thereto and under the Safety Appliance Act of Congress and the amendments thereto, and under the Interstate Commerce Act and the amendments thereto, and the rulings of the Interstate Commerce Commission thereon there was no negligence shown against the defendant in this cause.

141.

The verdict is indefinite, uncertain and therefore void, under the Employers' Liability Act of Congress of April 22, 1908, and the amendments thereto. Said verdict is also void, indefinite, uncertain and therefore void, because it does not show how much of the recovery was for pain and suffering, and how much of the recovery was for pecuniary loss to the beneficiaries, to-wit, to the widow and child. Said verdict is in a lump sum, and as it does not separate said amounts, it is therefore no verdict, and void.

Premises considered, the defendant prays that the verdict herein be set aside and a new trial granted.

JAMES B. McDONOUGH,
Attorney for Defendant.

594 Thereupon the court, being well and sufficiently advised in the premises, held that said verdict was excessive, and that unless a remittitur should be entered by the plaintiff in the sum of \$7,000.00, said motion for new trial would be granted. Thereupon the plaintiff entered a remittitur of \$7,000.00, leaving

the verdict to stand at \$18,000.00, and thereupon the court overruled said motion for a new trial, and the defendant then and there excepted, and still excepts. And the defendant then and there prayed the court for ninety days in which to prepare and file its bill of exceptions herein, and the court allowed and granted to the defendant ninety days from and after July 22nd, 1913, in which to prepare and file its bill of exceptions herein.

And now comes the defendant, within the time allowed by the court, and presents to the court on this 19th day of September, 1913, its bill of exceptions herein, and prays that the same be signed, sealed and made a part of the record herein; which is accordingly done. Said defendant also on July 22nd, 1913, prayed an appeal to the Supreme Court which was granted, and said defendant now prays its appeal to the Supreme Court, which is by the court granted.

In witness whereof the undersigned, as judge of the court, trying said cause, hereby certifies that the above and foregoing is a true and perfect bill of exceptions herein.

JEFFERSON T. COWLING,
Judge of the Ninth Judicial Circuit.

This bill of exceptions was filed Sept. 20th, 1913.

ED JONES, *Clerk.*

595

In the Circuit Court of Little River County.

SAM E. LESLIE, Adm'r of the Estate of L. A. Old, Deceased, Pl'ff,
VS.

KANSAS CITY SOUTHERN RY. Co., Def't.

Judgment.

Now on this 11th day of July, 1913, this cause coming on to be heard, comes the defendant and files his motion for a continuance, which motion is by the Court overruled to which action of the court the defendant at the time excepted and asked that its exceptions be noted of record, which was done, and the court proceeds to the trial of the cause.

Thereupon, came L. F. Wheelis and eleven other jurors from the regular panel, who were by the court found qualified and who were accepted by the parties as a jury to try the issues involved in said cause, and after hearing a part of the testimony, one of the jurors, to-wit: George Chewning suddenly became very ill and could not at this time proceed in the further discharge of his duties as a juror, and the defendant refusing to proceed with the trial in the absence of said sick juror the further consideration of this cause was postponed until the 17 day of July, 1913, and the jury were permitted to separate under the proper instructions of the court not to discuss the case among themselves or with any one else or permit any one to discuss or speak of the case in

their presence or hearing, and to refrain from reaching or trying to reach any conclusion on its merits of the case or on any issue therein until it was finally submitted to them.

596 And on the 17th day of July all the jurors appeared together with all parties, and the court asked each juror if he had discussed this cause or anything pertaining thereto with any person, or if any person had spoken of the case to him or in his presence or hearing, or if he had received any information from any source concerning this case since the jury was permitted to separate and each juror answered in the negative; and the further consideration of this cause is by the court resumed, and the jury after hearing all the testimony and having received the instructions of the court as to the law, and having heard the argument of counsel on either side, retired to consider of their verdict and afterwards returned into court the following verdict: "We the jury find for the plaintiff and assess the damages at \$25,000.00 (Twenty-five Thousand Dollars) L. F. Wheelis, Foreman."

It is therefore by the court considered, ordered and adjudged that the plaintiff, Sam E. Leslie, as Adm'r of the estate of Leslie A. Old, deceased, have and recover of and from the defendant the Kansas City Southern Ry. Co. for the benefit of Annie May Old, the widow of the deceased and William J. Old, Jr., the infant son of said deceased, the sum of Twenty-five Thousand Dollars, with 6% interest thereon from this date until paid, together with all his cost in this cause expended, and that he had execution therefor.

597 In the Circuit Court of Little River County.

SAM E. LESLIE, Adm'r of Leslie Old, Deceased, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RY. Co., Defendant.

Now on this the 23rd day of July, 1913, the Motion for a New Trial filed by the defendant in the above entitled cause coming on to be heard, the same was argued by counsel on either side and submitted to the court and the court, after due consideration thereof is of the opinion that the verdict of the jury in said cause is excessive to the amount of \$7,000.00 and if the plaintiff will remit that amount, the Motion for a New Trial will be overruled, otherwise it will be granted.

Thereupon, the plaintiff appeared in open court and asked to be permitted to remit said excess of \$7,000.00 which was by the court granted.

It is therefore, by the court considered, ordered and adjudged that the motion for a new trial be and the same is hereby overruled to which ruling of the court the defendant at the time excepted, prayed and was granted an appeal and asked and obtained 90 days in which to prepare and file its Bill of Exceptions.

It is further considered, ordered and adjudged by the court that the judgment heretofore rendered in said cause upon the verdict

of the jury in the sum of \$25,000.00 be and the same is hereby reduced to the sum of \$18,000.00 by reason of the remittitur heretofore entered by the plaintiff.

598

Fee Bill.

SAME E. LESLIE, Adm'r,

VS.

K. C. S. RY. Co.

A. T. Collins, Sheriff.....	\$9.25
H. W. Hobson, Wit.....	5.00
R. Y. Secrest.....	5.00
S. L. Miller.....	19.10
W. G. Olds.....	19.10
J. H. Burks.....	18.30
L. S. Monroe.....	18.30
Frank Sweeney.....	9.50
J. Gutteridge.....	12.30
C. W. Black.....	18.30
C. N. Swanson.....	12.30
R. E. Coleman.....	12.30
O. C. Buschow.....	18.30
J. R. Saunders.....	4.70
T. J. Clayton.....	18.30
E. Maggard.....	18.30
H. Evans.....	18.30
R. E. Lee.....	18.30
T. F. Anderson.....	18.30
J. T. Monroe.....	18.30
J. J. Richards.....	4.70
R. L. Bailey.....	18.30
V. V. Blakely.....	18.30
E. B. Blakely.....	18.30
A. C. Holt.....	18.30
C. H. Miller.....	4.70
J. W. Moore.....	4.70
H. Tucker.....	16.80
G. A. Tucker.....	18.30
C. Cochran.....	16.80
Ed Jones, Clerk.....	20.90
Ed Jones, Clerk, this Transcript.....	80.00

599

STATE OF ARKANSAS,

*County of Little River:**Certificate.*

I, Ed Jones, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the foregoing pages of typewritten matter contain a true and compared copy of all the

papers, judgments and orders of the Court and other pleadings and proceedings of the Little River Circuit Court in the trial of the cause styled #685, Sam E. Leslie, Admr. vs. The Kansas City Southern Railway Co., as therein appears and as appears on file and of record in my office.

Witness my hand and the seal of said Court, in Ashdown, on this the 18th day of October, 1913.

ED JONES, *Clerk.*

600

Prayer for Appeal.

In the Supreme Court of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

SAM E. LESLIE, as Administrator of the Estate of Leslie Old, Deceased, Appellee.

Prayer for an Appeal.

Comes the Kansas City Southern Railway Company, and prays an appeal to the Supreme Court herein, from the judgment and decree rendered by the Little River Circuit Court, and alleges as error all of the points set out in the motion for new trial, and attaches hereto a duly certified transcript of the proceedings.

Premises considered, the appellant, The Kansas City Southern Railway Company, prays that said appeal be allowed.

THE KANSAS CITY SOUTHERN RAILWAY CO.,

By JAMES B. McDONOUGH, *Its Attorney.*

Appeal Granted October 31st, 1913.

P. D. ENGLISH, *Clerk.*

601

Record Entries, Supreme Court.

STATE OF ARKANSAS,

In the Supreme Court:

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 24th day, being the fourth Monday of November, A. D. 1913, at the Court-house, in the City of Little Rock, the following proceedings were had, to-wit: On the 9th day of March, 1913, a day of said term:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
v.
SAM E. LESLIE, as Administrator of the Estate of Leslie Old, Deceased, Appellee.

Appeal from Little River Circuit Court.

This cause having heretofore been noted for oral argument, is now, by the Court, set down for such argument on March 23rd inst.

And on the 23rd day of March, 1913, the following proceedings were had, to-wit: (Caption Omitted.)

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement.

602 And on the 6th day of April, 1913, the following proceedings were had, to-wit: (Caption Omitted.)

This cause came on to be heard upon the transcript of the record of the Circuit Court of Little River County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs, and that said appellee recover of said appellant and Fidelity & Deposit Company of Maryland, surety in the supersedeas bond filed in this cause, the sum of Eighteen Thousand Dollars, with interest thereon at six per cent. from the 23rd day of July, 1913, the amount of judgment of said circuit court.

It is further considered that said appellee recover of said appellant and said surety all his costs in this court and the court below in this cause expended, and have execution thereof.

603 And on the 20th day of April, 1913, the following proceedings were had, to-wit: (Caption Omitted.)

Come- the appellant by its attorneys and files a petition for rehearing, and prays for two weeks' time in which to file a supporting brief, which time is by the court granted.

And on the 4th day of May, 1913, the following proceedings were had, to-wit: (Caption omitted.)

The petition for rehearing filed herein being now called, is submitted together with the supporting briefs, and is by the Court taken under advisement.

604

In the Supreme Court of Arkansas.

No. 2862.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,

vs.

SAM E. LESLIE, Administrator, Appellee.

Petition for Rehearing.

Comes the appellant, and respectfully petitions the Court herein for a rehearing in this cause, and a reversal of the judgment herein upon the following grounds, to-wit:

I.

This court has inadvertently held that the complaint states a cause of action under the Act of Congress of April 22nd, 1908, as amended by the Act of April 15th, 1910, known as the Federal Employers' Act, whereas under a proper construction of said Act of Congress the complaint herein does not state a cause of action.

II.

The Court has inadvertently held that said cause cannot be removed to the Federal Court under the Acts of Congress known as the removal acts, and under the Federal Employers' Liability Act above named.

III.

The court has inadvertently held that under said Federal Employers' Act above named, the motion to strike out certain parts of the complaint was not well taken.

IV.

605 The court has inadvertently held that under said Federal Employers' Liability Act and the other Acts of Congress bearing upon the subject, the motion to make the complaint more definite and certain was not well taken.

V.

The court has inadvertently held that under said Employers' Liability Act the court below did not err in overruling defendant's demurrer to the complaint.

VI.

This court has inadvertently held that under said Federal Employers' Liability Act the court below did not err in overruling defendant's motion for a continuance.

VII.

The court has inadvertently held that the facts as stated by counsel for appellee are the facts as shown by the record in this cause.

VIII.

The court has inadvertently held that parts of the body of the deceased were found on the outside of the rails of the defendant, whereas the testimony is to the very contrary.

IX.

The court has inadvertently held that there was nothing on the end of the tank car for the brakemen to hold to while passing from the refrigerator car to the tank car.

X.

The court has inadvertently held that it was necessary for a brakeman in passing from the refrigerator car to a tank car, to release his hold on the refrigerator car before he was able to secure a hand hold on the railing on the tank car.

606

XI.

The court has inadvertently held that under said Federal Employers' Liability Act and the amendments thereto, that the court below did not err in permitting members of the train crew to testify that they had some trouble with the air appliances, whereas under a proper construction of said Federal Employers' Liability Act, such testimony was inadmissible.

XII.

The court has inadvertently held that the admission by the court of this inadmissible testimony was not prejudicial; whereas under said Federal Employers' Liability Act the admission of said testimony was prejudicial.

XIII.

This court has inadvertently held that the court below did not err in permitting witnesses to testify that they had observed the equipments furnished by railroads in this country as to ladders and handholds on box cars and refrigerator cars, and that from 50% to 75%, and a greater per cent of refrigerator cars were equipped with ladders and handholds on the end of said cars, and that in their opinion it was much safer for brakemen on cars thus equipped to pass from the top of a high car to the platform of a low car; whereas under a proper construction of said Federal Employers' Liability Act and the Interstate Commerce Act of Congress and the amendments thereto and the Safety Appliance Act of Congress and the rulings of the Interstate Commerce Commission said testimony of said witnesses was wholly inadmissible.

XIV.

This court has inadvertently held that under the Interstate Commerce Act of Congress and the safety appliance Act of Congress the evidence of said witnesses last named was admissible; whereas, under the Safety Appliance Act of Congress and under the Interstate Commerce Act of Congress and the rulings and regulations of the Interstate Commerce Commission said testimony was wholly inadmissible.

XV.

The court has inadvertently held that the testimony of the witness, T. J. Clayton, as to what might have caused unusual jerks of the train at the time it started, were admissible; whereas, under said Acts of Congress above named, said testimony was wholly inadmissible.

XVI.

The court has inadvertently held in the sixth paragraph of the opinion herein, that under the Federal Employers' Liability Act of Congress upon which this suit was based, and under the other Acts of Congress above named, there was sufficient evidence to submit the issues to a jury; whereas, under said Acts of Congress above referred to, the evidence was wholly insufficient to authorize the submission of the case to the jury by the court, as, under said Acts of Congress and the decisions of the Supreme Court of the United States thereon, there should have been a directed verdict in favor of the defendant.

XVII.

The court has inadvertently held that under said Acts of Congress above referred to, this case cannot be distinguished from that of *St. Louis, Iron Mountain & Southern Ry. Co. v. Owen*, 103 Ark. 61, and the case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Hemphling*, 156 S. W. Rep. 171; whereas, under said Act of Congress and the decision of the Supreme Court of the United States in the case of *St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter*, 229 U. S. 265, and other cases of the Supreme Court of the United States, there is no substantial fact in this case that would warrant a court in submitting the issues to a jury, or that would warrant a jury in finding a verdict for the plaintiff, and upon said Acts of Congress and said decisions of the Supreme Court of the United States, there should have been a directed verdict in favor of the defendant.

XVIII.

This court has inadvertently held that there was a casual connection shown by the evidence in the death of Leslie A. Old, and the alleged violent jerking of the train; whereas, under said Acts of Congress, and said decisions of the Supreme Court of the United States, there is no such evidence in the record.

XIX.

The court has inadvertently held that under said Acts of Congress the jury were warranted in finding that the alleged negligence of the defendant in not having the cars equipped with proper hand-holds, concurred with the alleged negligent jerking of the train in producing the death of Old; whereas, the testimony rather tends to show that Old's death was due to his intoxicated condition, and to his throwing a rock from the car into the window at the agent, who was in charge of the station.

XX.

The court has inadvertently held that there was but one opening between the place where the man supposed to be Old was last seen, and the place where the jury found that he fell and was killed.

XXI.

The court has inadvertently held that the jury found that
609 Old fell between the cars as alleged, and claimed; whereas, under said Acts of Congress there is no testimony to show that he was injured as alleged.

XXII.

The court has inadvertently affirmed the case upon mere conjecture; whereas, under said Acts of Congress, no verdict can be sustained upon conjecture.

XXIII.

The court has inadvertently held that the fact of the deceased were on the outside of the east rail; whereas the undisputed evidence shows to the exact contrary.

XXIV.

The court has inadvertently held that under said Acts of Congress and especially the said Employers' Liability Act of Congress, on which this suit was brought, that it was a question for the jury, under the circumstances, as to whether or not the death of Old was caused by the negligence of appellant, as alleged in the complaint; whereas, under the substantial evidence, and under the undisputed evidence, and under said Federal Employers' Liability Act it was a question of law, and a verdict should have been directed for the defendant.

XXV.

This court has inadvertently held in the seventh paragraph of the opinion, that the verdict was not based upon conjecture; whereas, upon a proper construction of said Employers' Liability Act, the said verdict is based wholly upon conjecture and guess.

XXVI.

610 The court has inadvertently held in the eighth paragraph of the opinion that there was no error in excluding the testimony of several witnesses to the effect that the deceased, Leslie A. Old, immediately after the accident, admitted that he was injured because he attempted to catch the train and slipped; whereas, under the Employers' Liability Act and its amendments of April 5th, 1910, said testimony under said Acts of Congress properly construed was admissible, and the same should not have been excluded.

XXVII.

This court has inadvertently held in said eighth paragraph of the opinion, that said testimony was excluded by the lower court at the time it was offered; whereas, all of the evidence of A. C. Holt, V. V. Blakely, E. B. Blakely and G. A. Tucker as to the admissions of Leslie Old, to the effect that he was injured because he attempted to catch the train and slipped, was admitted by the court below without objection from either side, and after said testimony as to said admissions by the deceased had been duly admitted, and introduced, and was before the jury, counsel for the appellee then moved to exclude all of said testimony without confining the motion to only one of the alleged causes of action.

This court in the opinion has decided the question of the admissibility of this evidence, as though the same was offered and excluded; whereas, in truth said evidence was duly introduced, and went to the jury, and thereafterwards counsel for the appellee moved to exclude said evidence without confining the motion to exclude to the alleged inadmissible part of said testimony.

XXVIII.

611 The court has inadvertently held in said eighth paragraph of the opinion, that the evidence of A. C. Holt, V. V. Blakely, E. B. Blakely and G. A. Tucker as to the admission of Leslie Old, the deceased, to the effect that he was injured because he attempted to catch the train and slipped are inadmissible; whereas under the said Federal Employers' Liability Act of Congress and the amendments thereto, the said testimony was admissible as offered, and it should not have been excluded after it had been admitted.

XXIX.

The court has inadvertently held that the evidence of W. J. Old and the application of the deceased Leslie A. Old, was inadmissible; whereas, under said Acts of Congress above referred to, the said evidence was admissible.

XXX.

The court has inadvertently held that under said Federal Employers' Liability Act of Congress on which this action was based, the rules of evidence as prescribed by the State Court must control

in the trial of an action under said Federal law; whereas, under a proper construction of said Acts of Congress, the rules of evidence in the State courts do not control.

XXXI.

This court has inadvertently held in paragraph nine of the opinion, that no specific objection was made to the rulings of the court in giving and refusing prayers for instructions, and that none are abstracted; whereas, said specific objections were made, and the same were properly abstracted.

XXXII.

The court has inadvertently held that there were no defects in the instructions given by the court; whereas, under said Act of Congress, the objections to said instructions which are shown in the record were well taken, and said instructions under said Acts
612 of Congress should not have been given.

XXXIII.

The court has inadvertently held that the instruction given by the court under the said Federal Employers' Liability Act, properly gives the measure of damages in this cause.

XXXIV.

This court has inadvertently held that it was unnecessary for the jury to separate the amounts of recovery alleged to be due the widow and the amount alleged to be due the child; whereas, under proper construction of said Acts of Congress the verdict should have shown the amount of recovery in favor of the widow and the amount of recovery in favor of the child.

XXXV.

This court has inadvertently applied the measure of damages under the Arkansas Lord Campbell's Act instead of applying the measure of damages as prescribed in the said Federal Employers' Liability Act of Congress.

XXXVI.

This court has inadvertently held that the verdict was not excessive, and has inadvertently permitted the child to recover for damages claimed to have accrued long after his majority; whereas under said Federal Employers' Liability Act of Congress the child could not recover for a period extending beyond the time of his majority.

XXXVII.

This court has inadvertently held that, according to annuity tables, it would require \$14,518.00 to produce a life annuity of

\$700.00 for one of Old's age; whereas, under said Federal Employers' Liability Act, such is not the law.

613

XXXVIII.

This court has inadvertently held that the form of the verdict was not prejudicial to the appellant.

Premises considered, the said appellant prays that it be granted a re-hearing in this cause, and that the judgment herein be reversed, set aside, and held for naught, or if the court should deem proper, that the same shall be reversed and remanded.

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,
By JAMES B. McDONOUGH,
Its Attorney.

Certificate.

I, James B. McDonough, do hereby certify that I have carefully examined the opinion of the court in the above entitled cause, and I further certify that in my opinion the above and foregoing petition for a rehearing is well taken, and that in my opinion this cause should be reversed.

JAMES B. McDONOUGH,
Attorney for Appellant.

Filed April 17, 1914. P. D. English, Clerk, by W. P. Sadler,
D. C.

614 And on the 18th day of May, 1913, the following proceedings were had, to-wit: (Caption Omitted.)

Being fully advised, the petition for rehearing filed herein is by the court overruled.

615 In the Supreme Court of Arkansas, April 6, 1914.

No. 244.

KANSAS CITY SOUTHERN RY. CO.

v.

LESLIE, Adm'r.

Statement of Facts.

This is a suit brought by the appellee as administrator of the estate of Leslie A. Old, deceased, for the benefit of the widow and her infant child, under the Federal Employers' Liability Act and its amendment of April 5th, 1910. The suit is brought for the loss of contributions to the widow and child by reason of the death of Old, and also for the conscious p-in and suffering which Old en-

dured before his death, which, under the act, survived to the administrator for the benefit of his widow and child.

The complaint, after alleging the incorporation of the appellant, and that it was engaged in interstate commerce, and after alleging that Leslie A. Old was in the employment of appellant as swing brakeman, actually engaged at the time of his injuries as such brakeman on a train that was being operated at the time in interstate commerce, alleged "that his work required him to look after and pass over the tops of the cars composing the middle section of said train; that there were two box cars or refrigerator cars of equal height and that immediately in front of these two cars was an oil tank car; that the floor of this car was seven or eight feet lower than the runway on top of the refrigerator car immediately in its rear; that there were no ladders or grab irons or handholds on the end of the box or refrigerator car to enable the brakeman to safely
616 get from the top of the box or refrigerator car onto the platform or runway of the oil car immediately in front of it, except a ladder or grab iron down the side of the refrigerator car some distance from the end thereof, that the absence of these grab irons or handholds or ladders down the end of the box or refrigerator car made it unnecessarily hazardous for the brakemen to pass from the top of the box or refrigerator car to the platform or walkway of the oil tank car immediately in front of it; that there were no grab irons or handholds on the end of the oil car or tank car immediately in front of the refrigerator car or any other appliances thereon to enable a brakeman in passing from the rear car to the oil car to hold to and steady himself while making the passage."

The complaint further alleged "that the engineer of said train was negligent on the occasion of deceased's injury in permitting his air to become out of order or in carelessly manipulating his air in such manner that said train was caused to jerk violently and unusually, which jerking contributed to the injury of plaintiff's deceased as aforesaid."

There were further allegations in the complaint to the effect that the defendant was negligent in making up said train "in carelessly and negligently placing the oil car or tank next to the box or refrigerator car knowing the platform or walkway on the oil car was some six or seven feet lower than the top of the box or refrigerator car, without providing some means or appliances on both the refrigerator car and the oil car which would enable brakemen to get from one to the other without any unnecessary danger."

There is an allegation to the effect that the acts of negligence complained of were unknown to plaintiff's deceased, and by reason of his inexperience as a brakeman he was unable to and did not appreciate the dangers arising from said acts of negligence.

617. There was a further allegation to the effect that, "by reason of the absence of such handholds or ladders on the end of said box car or other proper appliances which would have enabled deceased to safely go from the top of said box car to said oil car concurring with the unusual and violent jerking of the train as it

passed out of Page deceased was unable to get from the top of the box car to the oil car, and while in the effort to do so, and while in the exercise of due care himself, he was thrown between the ends of said cars or fell between the ends of said cars" and received the injuries, which were specifically described.

The complaint concluded with a prayer for damages on account of pain and suffering in the sum of \$10,000 and for loss of contributions in the sum of Fifteen thousand dollars, and for a judgment in the total sum of twenty-five thousand dollars.

The appellant, in due time and form, filed a petition and bond for removal of the cause to the Federal court, which was overruled. The appellant also moved to have the complaint made more definite and certain, which motion was overruled. Appellant then demurred and its demurrer was overruled. Appellant then moved to strike out certain portions of the complaint, which motion was overruled. Appellant then answered, denying the allegations of the complaint and setting up the defense of contributory negligence. The appellant then filed a motion for a continuance, which was overruled. The appellant duly excepted to the rulings of the court on its motions and in overruling its demurrer.

The cause was then sent to the jury, and the testimony developed the following facts, as stated by counsel for appellee, which we find to be substantially correct.

On the forenoon of March 24th, 1913, Leslie A. Old was sent out from De Queen, Arkansas, as middle brakeman on appellant's through freight train to Heavener, Okla. Old was called for service on the train about an hour before it left De Queen. Appellant's road traverses a mountainous country and there were some heavy grades from Mena, north. Before descending these grades it was necessary for the brakemen to go over the tops of the cars and turn up the retainer valves on from 75 to 80 per cent of the loaded cars in order to assist the engineer down grade, and after the descent was made it was then necessary for the brakeman to again go over the tops of the cars and turn the retainer valves down. It was upgrade from Mena to Rich Mountain, and from Rich Mountain to Page, where the injury occurred, it was down grade. From Page two miles north it was up grade and then north down grade set in. The train arrived at Page at 8 o'clock at night and stopped there to get orders for future movements. Old and the head brakeman and the conductor all went in the station house at Page to secure their orders. They then left the station house to take up their duties on the train. The head brakeman came out first with orders for the engineer and proceeded to the front of the train. Then the conductor came out and walked to the south end of the platform, about 80 feet from the station, and stopped. By this time the train had started slowly forward. Old passed the conductor, with his lantern, going south, and a very short time thereafter the conductor saw some man with a lantern climb up on the train about 80 feet south of him and from the point where he saw Old go. As the train moved slowly along a man with a lantern on top of the train, going north, passed the conductor. The car that the man was on was the second car in the rear of the tank car. As the train

619 moved out there was a violent and unusual jerking of the cars, two being especially noticeable. Just after the last heavy jerk some one was heard to cry out "Oh! oh!" as if calling for help. After the train passed out a witness whose attention was attracted by the unusual jerking of the train went out on the track to discover what was the cause of the jerking, and 95 yards north of the front door of the station he found Leslie Old lying on the track between the rails with both legs cut off between the knees and the feet, one shoulder crushed and mangled, part of the left hand crushed off, and skin knocked off his head. Some 15 or 18 feet south of where he lay his lantern was found lying on the track between the rails, with the broken glass lying around it. About 7 feet north of the lantern blood and small pieces of bone were found on the rail nearest the depot, and pieces of bone and blood were also found between this point and where deceased lay. There were no signs of blood or bones anywhere else.

The two cars immediately in the rear of the tank car complained of were S. F. R. D. cars, of the same type and height. The tank car was a large iron tank set upon a frame in the nature of a flat car, and that part of the floor of this car between the tank and the outer edge was the only walk way or passage way over this tank car. The tank car had side rails on the outer edges of the side of the car which lacked 24 inches coming to the end of the frame of the car. The only appliance furnished the brakemen to pass from the top of the S. F. R. D. car to the tank car was a side ladder on the end thereof. One had to step from this side ladder onto the end of the tank car and grab to the end of the side rail on said car. From the side ladder to the nearest end of the side rail was about 5 feet. There

620 was no ladder on the S. F. R. D. car and no grab irons on the end of that car except down near the bottom of the car, which was used by the brakemen in coupling and uncoupling cars. There were no end ladders or grab irons on the tank car at all except on the sill below the floor. There was nothing on the end of the tank car for brakemen to hold to while making the passage except the end of the side rail. It was necessary for brakemen, in passing from the side ladder on the S. F. R. D. car to the tank car, while the train was in motion, to release his hold on the former before he was able to secure a handhold on the railing on the tank car.

It was shown that the train would have to go a quarter or a half mile after starting before it could get under good headway.

The appellant excepted to the rulings of the court in admitting and excluding testimony.

The appellant presented 97 prayers for instructions. Of these the court refused all but seven. The court granted ten prayers for instructions on behalf of appellee, and gave eight instructions of its own motion. The appellant excepted to the rulings of the court in refusing its prayers for instructions, and also excepted to the rulings of the court in granting the prayers of appellee for instructions, and to the giving of the instructions by the court of its own motion.

The jury returned a verdict in favor of the appellee for \$25,000. The court caused a remittitur to be entered in the sum of \$7,000.00.

and overruled appellant's motion for a new trial, and entered judgment in favor of the appellee for the sum of \$18,000.00, from which this appeal has been duly prosecuted.

Other facts stated in the opinion.

621

Opinion.

WOOD, J. (after stating the facts):

I. The court did not err in denying the petition for removal to the Federal court. *St. Louis & S. F. Ry. Co. v. Conarty*, 106 Ark. 421; *Kansas City Southern Ry. Co. v. Cook*, 100 Ark. 487.

II. The complaint alleged that the appellant was negligent in not providing ladders and grab irons on the ends of the cars to enable the brakemen to pass safely from one car to the other, and that appellant was negligent in the manner of making up its train by placing the tank car next to a high car, and that appellant was negligent in that its engineer handled his engine in such manner as to cause the train to unnecessarily and violently lurch and jerk, and that the negligence in failing to provide necessary handholds, ladder- or other appliances to enable the brakemen to pass safely from one car to the other concurring with the alleged negligence of the engineer caused the injury to Old of which the appellee complained. These allegations were sufficient to state a cause of action against appellant.

The court did not err therefore in overruling appellant's motions to strike, and to make more definite and certain, and in overruling the demurrer. While some portions of the complaint were redundant and the pleader entered into unnecessary detail of description, the complaint for that reason was not defective and there was no prejudicial error in refusing to strike out such unnecessary allegations.

It is not in best form to enter into more specific detail in stating a cause of action than is necessary to advise the defendant of the particular grounds upon which the complaint seeks to hold him liable. These grounds should be stated with as much definite-
622 ness and certainty as possible, but more specific details are not required and are matters to be developed by the testimony. See *Little Rock & Ft. S. Ry. Co. v. Smith*, 66 Ark. 278.

III. The appellant contends that the amended complaint was filed within less than ten days before the beginning of the term of court, and that the amended complaint stated new causes of action which entitled appellant to a continuance. The alleged new causes of action are: First, "that there were no grab irons or hand holds on the end of the oil car or tank car immediately in front of the refrigerator car or any other appliances thereon, to enable brakemen in passing from the rear car to the oil or tank car to hold to and steady himself while making said passage;" Second, "That the engineer of said defendant was negligent on the occasion of plaintiff's injury in permitting his air to become out of order, or in carelessly manipulating his air in such manner that said train was

caused to jerk violently and unusually, which jerking contributed to the injury of plaintiff's deceased, as aforesaid."

On account of the alleged new cause of action in regard to the tank car the appellant set forth that "it was impossible for the defendant to get a fair trial herein without having sufficient time to fully investigate the history especially of said tank car. * * * It is absolutely necessary for a fair trial herein that defendant have time enough to get the complete history of each tank car in said train so as to prepare to meet the plaintiff's proof on the subject." The appellant further set forth that "defendant cannot safely go to trial without the full history of each refrigerator car in controversy, so as to enable the defendant to ascertain whether or not the cars were in service before July, 1911."

623 There was no prejudicial error in overruling the motion for a continuance on these grounds, for, at the trial, it was shown, without objection, that the defendant had made investigation and was familiar with the history of both of the S. F. R. D. cars in controversy and also the tank car. It was shown, without objection, by witnesses who were familiar with the history of these cars, that they were in the service prior to July, 1911, and that they had not been sent to the shop for general repairs since that date. It thus appears that at the trial the appellant had the benefit of the testimony which in the motion for continuance it had asked time to enable it to procure.

In regard to the alleged negligence of the engineer in permitting his air to become out of order appellant contended that it should have had an opportunity "to look into the air on each of the 51 cars in the train, and that it would require time to do so."

The original complaint alleged that "the air on the train failed to work properly and the train could not therefore be handled or controlled properly," and that "because of the defective condition of the air as aforesaid said train began jerking and swaying violently and so continued until plaintiff was injured."

It will thus be seen that these allegations of negligence as to the engineer set up in the amended complaint did not introduce any new or original cause of action, but were only a different method of stating a cause of action that had already been set forth. Furthermore, it was surplusage for the pleader to allege the specific causes or conditions that caused the violent and unusual jerking.

624 It was entirely sufficient to have alleged that the engineer of appellant was negligent in causing a violent and unusual jerking of the train which caused, and contributed to the injury of the plaintiff, without setting forth the particular defects or conditions that caused such jerking. These were matters to be developed by the testimony and the appellant had sufficient notice under the general allegations of negligence caused by a violent and unusual jerking of the train to require it to make all investigation it deemed necessary to meet such allegation.

IV. Appellant urges that the court erred in permitting members of the train crew to testify that they had some trouble with the air appliances on the train. Appellant contends that this testimony was incompetent and also that it was prejudicial for the reason that

it authorized the jury to conjecture that it had something to do with the alleged jerking of the train at the time of the injury.

Appellant says that the same witnesses who testified that there was trouble with the air on certain cars of the train before the same reached Page also showed that the cars in which there was a defective condition as to the air were set out of the train before it arrived at Page, and therefore the defective condition in those cars could not have been competent to show that the jerking of the train at the time of the injury was caused by a defect in the air in those cars. If, as counsel say, "the witnesses who testified to the trouble testified that the cars were set out on account of the trouble and that there was no trouble at Page," then the testimony could not be prejudicial to appellant for the reason that the jury could not have concluded that those cars were in the train at the time of the injury. But, conceding that there was testimony to the effect that the air on

625 some of the cars in the train was defective, that the testimony was competent at the time it was offered as tending to show that this defective condition caused the jerking of the train, if the testimony was afterwards rendered incompetent because it was shown that these cars were removed before the injury occurred, then appellant, after this testimony was introduced, should have moved to exclude the testimony after its incompetency had thus been made to appear. The appellant simply rested on the objection that it made to the testimony at the time it was offered, and it is not in an attitude to complain because the testimony at that time was clearly competent and relevant to the issue. Moreover, the court told the jury that the plaintiff would not be entitled to recover if the death of Old occurred from any negligence of the defendant other than that alleged in the complaint. The negligent jerking of the train was alleged to have occurred at Page. The effect of the instruction was to limit the jury to a consideration of the conditions of the cars in the train at the time of the alleged injury at Page.

The court permitted, over the objection of appellant, certain witnesses to testify that they had observed the equipment furnished by railroads in this country as to ladders and handholds on box and refrigerator cars, and that from 50 to 75 per cent, and a greater per cent of refrigerator cars, were equipped with ladders and handholds on the end of the cars, and that in their opinion it was much safer for brakemen on cars thus equipped to pass from the top of a high car to the platform of a low car than it was to pass from high to low cars that have only ladders or handholds on the side of the car near the end as was the case with the cars complained of.

The witnesses qualified as experts by showing that they
626 had been engaged in train service as brakemen or switchmen from 10 to 20 years and that they were familiar with the method in which the cars are equipped in order to enable them to perform their duties.

Appellant contends that in the absence of a statute requiring railroads to place handholds or grab irons on the ends of their cars that there is no duty upon the railroad company as between it and its employees to place such handholds thereon, and therefore evidence showing that there were no such appliances does not tend to

show negligence. It was the duty of appellant, regardless of any statute prescribing how freight trains should be equipped for the safety of employees, to exercise ordinary care to furnish such employees with a reasonably safe place in which, and with reasonably safe appliances with which, to work. See *Railway Co. v. Holme*, 88 Ark. 181; *Wilcox v. Hurbert*, 90 Ark. 145. The testimony was competent on the issue as to whether or not appellant was negligent.

In *Oakleaf Mill Co. v. Littleton*, 105 Ark. 392, we held that the test of a master's duty in furnishing appliances and a place to work is what a reasonably prudent person would have ordinarily done in such a situation, and proof of what was the custom of others under like conditions and circumstances is evidence, but not conclusive of what a reasonably prudent person would ordinarily do.

In the recent case of *St. Louis, I. M. & S. Ry. Co. v. Hempflin* — Ark. — (34 Ark. L. Rep. 491) 156 S. W. R. 171, we held that the failure of the company to provide grab irons or handholds was necessary for the reasonable safety of brakemen in the performance of their duties in passing from one car to another was actionable negligence. It was the duty of appellant to exercise ordinary care

to equip its train with such appliances in the way of ladders and grab irons and handholds as would furnish its employees with reasonably safe appliances to do their work, and if appellant did not exercise such care to equip its cars with such appliances as were in common use by other railroads on similar cars similarly situated, evidence of this fact would be proper for the consideration of the jury in determining whether or not appellant was negligent. See *Dooner v. Del. Etc. Canal Co.* 164 Pa. St. 17.

There was no error prejudicial to appellant in refusing to permit it to show that under the rules of the Interstate Commerce Commission appellant was not required to put handholds on the ends of the cars complained of until July 1st, 1916, unless the cars were shopped for general repairs. This ruling of the court was not prejudicial to appellant because the effect of the testimony was only to show that in the opinion of the Interstate Commerce Commission it was necessary for cars like the one under consideration to be equipped with handholds or end ladders in order to insure as far as possible the safety of employees who were required to use them. The fact that the Interstate Commerce Commission postponed the time for equipping the cars that were then in service did not relieve the appellant of the duty of exercising ordinary care to furnish its employees with safe appliances, and to provide them a safe place in which, to do their work. The Interstate Commerce Commission was without power to exempt the carrier from liability caused by its negligence.

V. Witness Clayton testified that he was a locomotive engineer with seventeen years' experience. On his examination in chief he testified that he was the engineer in charge of the engine on the train at the time Old was injured. He testified that there was no lurching or jerking of the train; that the engine and the air were in good condition and were working all right.

On cross examination he was asked the following questions:

tion: "Assuming that there was violent lurching and jerking of the train, what, in your opinion, could have caused it?" His answer was: "It could only have been caused by the engineer letting off too much steam." The appellant objected to the testimony, on the ground that it was incompetent and irrelevant. Appellant did not object on the ground that it was not responsive to the examination in chief. Testimony had been introduced tending to prove that after the train began moving out of Page there was a violent and unusual jerking. It had been shown also that the engine and the air were in good condition and that the train had moved out up grade more than 100 yards, tending to show that the slack had been taken out.

Appellee had the right to show, from the opinion of an expert, assuming that the circumstances as detailed were true, that the violent jerking of the train was caused by the engine letting off too much steam. It was a question for the jury, under the testimony, to determine whether or not there was a jerking of the train, and if so, what caused it. See *Midland Valley Ry. Co. v. Le Moyne*, 104 Ark. 327-341.

VI. Appellant next urges that the court erred in refusing to direct a verdict for the defendant. This we consider the most difficult question in the case and it has given us the greatest concern, but we are of the opinion that the case cannot be distinguished in principle, on the facts, from the recent cases of *St. L. I. M. & S. Ry. Co. v. Owen*, 103 Ark. 61, and *St. L. I. M. & S. Ry. Co. v. Hempfling*, supra.

In the latter case, after reviewing the evidence and the 629 authorities, we said: "The death of Hempfling was consistent only with the conclusion that he fell from the car by reason of the fact that he had no grab irons by which to hold as he was attempting to pass from the twelfth to the thirteenth car, as mentioned in the testimony. The jury were not invited to guess, without any proof, as to the probable cause of Hempfling's death. The law is well settled that where there are no eye witnesses to the injury and the cause thereof is not established by affirmative and direct proof, then all the facts established by the circumstances must be such as to justify an inference on the part of the jury that the negligent conditions alleged produced the injury complained of. Where such is the case the jury are not left in the domain of speculation, but they have circumstances upon which, as reasonable men, they may ground their conclusions. Negligence that is the proximate cause may be shown by circumstantial evidence as well as by direct proof."

In quoting from the Supreme Court of Missouri, we further said: "In actions for damages on account of negligence plaintiff is bound to prove not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence, as a fact, and not be left to mere speculation and conjecture. The rule does not require, however, that there must be direct proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature, and are so connected

and related to each other that the conclusion therefrom may be fairly inferred."

Applying these principles to the facts in hand, we are of the opinion that the jury were warranted in finding that the death of Old resulted through the negligence of appellant in causing the violent jerking of the train, which, concurring with its negligence also in not equipping its cars with necessary ladders, grab irons or handholds on the end thereof in order to enable Old to pass from the S. F. R. D. car to the tank car, caused him to fall between said cars and produced his death.

The jury were warranted in finding that when Old came out of the station at Page with his orders he proceeded, with his lantern in his hand, to mount the cars where his duty called him; that he was passing from the top of the refrigerator car to the tank car and that on account of the same not having been provided with any grab irons or handholds, in attempting to make the passage, as the cars lurched forward, he was thrown between them; that if the cars had been provided with the necessary grab irons he might have saved himself notwithstanding the sudden jerking or lurching of the cars by holding on to these grab irons. It was shown that there was only one opening in the train between where Old (or the man whom the jury might have found to be Old) was last seen and the end of the cars where the jury could have found and must have found that Old fell. The intervening space before he came to the space through which he must have fallen was between two refrigerator cars of the same height and it required only a short step to make this passage. Old being a large man, stout and active, it was not at all probable that he would have fallen between the two refrigerator cars. The character and the nature of the wounds that Old received, and the position in which his body was found, warranted the jury in finding that the only opening through which Old could have fallen was between the refrigerator car and the tank car. It was shown that to make the passage between the refrigerator car and the tank car the brakeman would have to come down the ladder on the right hand or east side of the refrigerator car. This ladder stood out from the body of the car two or two and a half inches and was about four to six inches from the corner of the car. To get on the tank car from this ladder the brakeman would have to throw himself around the corner of the refrigerator car and step diagonally across on the platform of the tank car and catch to the side railing on the outer edge of the tank car. This railing on the tank car was 24 inches from the end of the tank car, making a distance of five feet from the side ladder or handhold on the refrigerator car to the nearest appliance on the tank car that a brakeman could use as a handhold. To make the passage he would have to release his handhold on the refrigerator car in order to secure a handhold on the side railing of the tank car. He could only pass from the refrigerator car to the tank car by stepping around the corner of the refrigerator car diagonally toward the center of the tank car. The position that his body was in, the manner in which his legs

were injured, the fact that his legs were cut off by the wheels between the feet and the knees, and the fact that the feet must have been on the outside of the east rail, about the distance of the side ladder from the rail, and that blood and small pieces of bone were found on the east rail and nowhere else, all tended to prove, and warranted the jury in finding, that Old fell from the train while attempting to make the passage from the refrigerator car to the tank car in the manner indicated, and that if the train had been provided with the necessary grab irons or handholds on the ends that he might have made the passage and protected himself against the danger notwithstanding the violent lurching and jerking of the train. The fact that immediately after this last jerking of the train someone was heard to cry out Oh! Oh! and that
632 the body of Old was soon thereafter discovered, tends to show a causal connection between the lurching of the train and his death.

We are of the opinion that it was a question for the jury, under the circumstances developed in evidence, as to whether or not the death of Old was caused by the negligence of appellant as alleged in the complaint.

VII. Appellant relies upon several cases in this court wherein we have held that there must be some causal relation between the injury and the negligence and that the happening of the accident is not of itself sufficient to show such causal connection, and that where the cause of the injury is purely a matter of conjecture, surmise, speculation or supposition there can be no recovery, citing, among *the*, the recent cases of *Jonesboro, L. C. & E. Ry. Co. v. Minson*, 102 Ark. 581; *Denton v. Mammoth Springs, E. L. L. & P. Co.* 105 Ark. 161; and *Midland Valley Railway Co. v. Ennis*, 36 Ark. Law Re. 269, 159 S. W. 214.

The above doctrine was announced in cases where the facts showed that the causal connection between the injury and the negligence was merely conjectural. Each case, of course, must depend upon its own facts, and as we view the evidence in this case it is clearly distinguishable from the cases last mentioned, but does come under the doctrine, as already stated, announced in *St. L., I. M. & S. Ry. Co. v. Hemphling*, *supra*, and *St. L., I. M. & S. Ry. Co. v. Owens*, *supra*, where the facts as proved by the circumstances warranted a finding that the negligence alleged caused the injury, and that the causal connection was not a mere matter of conjecture but was proved by substantial, even though circumstantial, evidence.

VIII. The appellant urges that the court erred in excluding
633 testimony to the effect that Old admitted that he was injured because he attempted to catch the train and slipped. The record shows that about an hour and a half after the injury a witness asked Old how the injury occurred. Old at that time had begun to sink. The witness shook him several times and aroused him sufficiently for him to speak in a very low tone, and being asked the third time how the injury occurred Old stated that he tried to catch the train and slipped and fell. On being asked if he tried to catch the train or the caboose, he said the train.

Under the Employers' Liability Act and its amendment of April 5th, 1910, appellee as administrator of the estate of Leslie Old was entitled to recoverable damages by way of compensation for the financial loss to the widow and child of deceased by reason of the death of the husband and father. Appellee could also recover for the conscious pain and suffering which the husband and father endured after the injury, which survived to appellee as the personal representative of Old for the benefit of his widow and child. See Act of Congress April 22, 1908, sec. 1, and section 9 added by amendment April 5th, 1910.

The statute, as to the loss of contributions on account of the death of the husband and father, creates a right of action for the benefit of the widow and the next of kin wholly independent of the right of action given to the injured person for the pain and suffering which he endured on account of the injury. See *Mich. Cent. Ry. Co. v. Vreeland*, 227 U. S. 59. The latter right of action under the above amendment to the statute of April 5th, 1910 was made to survive to his personal representative for the benefit of his widow and next of kin. In *St. L., I. M. & S. Ry. Co. v.*

634 *Conarty*, supra, we said: "The statute as amended forbids the prosecution of more than one action and permits only one recover-; but the action is prosecuted, after the death of the injured person for the benefit of the widow and next of kin, and may include compensation for the pain and suffering endured, by the injured person as well as the pecuniary loss of earnings and contributions; in other words, compensation for all of the damages resulting from the injury for which the statute provides a remedy inures after the death of the injured person to the benefit of the widow and next of kin, but must be recovered in one action." See also, *Gulf, Colo. & S. F. Ry. Co. v. McGinnis*, MS. Op. (May 1, 1913).

The admissions of a deceased person against his interest are competent only when the action is for or against him in his own right. Conceding, without deciding that the testimony offered, to show the admission would have been competent and admissible as declarations against interest, and conceding that if the appellant had asked that the testimony be not excluded but limited to the right of recovery growing out of the cause of action for pain and suffering that the court would have erred in excluding the testimony; nevertheless there was no privity of interest between Old and his wife and child so far as their right to recover for the loss of contributions on account of his death is concerned. The testimony, if competent, in the right of action given them for this loss was purely hearsay. As stated by Mr. Greenleaf: "The ground upon which admissions bind those in privity with the party making them is that they are identified in interest; and, of course, the rule extends no further than this identity of interest." 1st Greenleaf Ev. Sec. 180.

In the case of *Garysonia-Nashville Lumber Co. v. Carroll*, 635 102 Ark. 461, we held: "Where two causes of action are united in one action, evidence offered by defendant which

was admissible in one case but not in the other, was properly excluded where the defendant did not ask that the testimony be limited to the cause to which it was applicable."

In *Murphy v. St. L., I. M. & S. Ry. Co.* 92 Ark. 159, we held that "it was error to permit the defendant to offer in evidence a written statement made by deceased in his lifetime to the effect that his mother was dead, as there is no privity between the next of kin and the deceased."

Here, under the above ruling, the testimony, to say the least, was clearly incompetent in the right of action for the loss of contributions. If incompetent for any purpose, as the appellant did not ask that it be limited to the right of action for pain and suffering, the court did not err in excluding it for all purposes. Here the appellee did not desire the testimony for any purpose, and the testimony as already shown, was wholly incompetent in the cause of action for loss of contributions. Therefore, it was the duty of appellant who alone desired the testimony to ask that it be directed or limited to the right of action in which it was competent, if competent at all. Not having done so, it is in no position to complain because the court excluded the testimony for all purposes.

Where the court excludes testimony which is incompetent in the whole case for one purpose but competent for another, it is the duty of the party who desires the testimony to be admitted for the purpose for which it is competent to request the court to have it admitted for that special purpose. The ruling of the court in excluding testimony will be upheld, if any ground justified
636 the ruling, in the absence of a specific request by the opposite party to have the testimony considered for the purposes for which it is competent.

In *St. L., I. M. & S. Ry. Co. v. Raines*, 90 Ark. 482, testimony was admitted over a general objection that was competent in one case, but incompetent in the other, and we said that it was the duty of the party objecting to ask that the testimony be limited solely to the case in which it was competent. The cases of *Lumber Co. v. Carroll*, *supra*, and *Ry. v. Raines*, *supra*, are in harmony and establish the same rule. See also *Central Coal & Coke Co. v. Niemeyer Lumber Co.* 65 Ark. 106; *Tooley v. Brown*, 70 N. Y. 34; *Enrich v. Union Stock Yards*, 86 Md. 482; *Egger v. Egger*, 135 Amr. St. Re. 567.

It is a well established rule that in actions in a state court to enforce rights given by the Federal statutes the rules of evidence of the State court must control unless otherwise provided by the Federal law. *Wigmore on Evidence*, Sec. 5. In the absence of a statute prescribing the rule of evidence upon the subject the law of the forum will govern.

IX. Only a few of the prayers for instructions on the part of appellant which the court refused are set forth in the abstract. And the appellant does not urge, in brief of counsel, any specific objection to the refused prayers which it sets out.

No specific objection to the rulings of the court in the giving and refusing of prayers for instructions are abstracted. Therefore

we will not consider any specific objections now urged by counsel to the rulings of the court in passing on the instructions. We find no inherent defects in the instructions which the court gave at the instance of the appellee and of its own motion. The court correctly submitted the issue as to whether or not appellant 637 was negligent as alleged in the complaint, and the issue as to whether or not there was a causal relation between the acts of negligence as alleged and the death of Old. No new principle is announced and no useful purpose can be subserved by setting out the instructions and commenting upon them in detail.

Counsel say that the court erred in giving appellee's prayer for instruction on the measure of damages because it does not state the measure of damages, under the Federal law, and because it does not separate the amount found for pain and suffering from the amount found for compensation for loss of contributions.

The instructions follow the rule announced by this court in *Railway v. Sweet*, 60 Ark. 550, for ascertaining the measure of damages for the widow and children. There we said: "The measure of their damages is what the jury may deem a fair and just compensation with reference to the pecuniary injuries resulting from the death of the husband and father. How is this compensation to be determined? By taking into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time; deceased's earning power, rate of wages, and the care and attention which one of his disposition and character may be expected to give his family. All these are proper elements for the consideration of the jury in determining the value of the life taken. From the amount thus ascertained, the personal expenses of the deceased should be deducted, and the balance, reduced to its present value, should be the amount of the verdict." *St. L. I. M. & S. Ry. Co. v. Haist*, 71 Ark. 258-68; *K. C. So. Ry. Co. v. Henrie*, 87 Ark. 443-54; *St. L. I. M. & S.*

638 *Ry. Co. v. Garner*, 90 Ark. 19-24; *Ark. S. W. Ry. Co. v. Wingfield*, 94 Ark. 75; *St. L. I. M. & So. Ry. Co. v. Hortung*, 95 Ark. 200; *Fort Smith & Western Ry. Co. v. Messick*, 96 Ark. 243-48.

We see no reason why there should be a different rule under the Federal statute. This statute like ours is modeled after Lord Campbell's Act. The Supreme Court of the United States has announced that the damages sustained by the widow and children are the benefits which might be reasonably expected from the husband and father in a pecuniary way had he lived. See *Mich. Central R. R. Co. v. Freeland*, 227 U. S. 59; *Amer. Rd. Co. v. Dedrickson*, 227 U. S. 145. The same rule obtains generally under statutes similar to ours. See authorities cited in brief of appellee.

In *Choctaw, O. & G. Co. v. Baskins*, we said: "Deceased was a stout, healthy man, 56 years of age, actively engaged in farming, with an earning capacity of \$400.00 to \$500.00 per annum. He labored in the field himself, as well as superintended the work on his farm. His wife and daughters, and one of his sons, (one of his

children being a minor), lived with him on the farm. There is no direct proof as to the amount of his contributions to the support of his family, but the presumption will be indulged that, as they lived with him on the farm, a reasonable amount of his earnings was contributed to their support. There is not, under all those circumstances, an entire absence of proof of those contributions. We must presume that he discharged his duty in some measure to them."

Applying the above rules to the facts in evidence, we are of the opinion that the judgment was not excessive. Old was twenty-five years old when he was killed. He had an expectancy of thirty five years. His wife was twenty-four years old, and their baby was only five weeks old. There was proof to warrant a finding that his net earnings per annum would be \$720.00. According to annuity tables, it would require \$14,518.00 to purchase a life annuity of \$700.00 for one of Old's age. This amount deducted from the judgment would leave the sum of \$3,482.00, as the amount to be recovered for the pain and suffering which he endured. This calculation does not take into account the probable increase in earning power.

We are of the opinion that the judgment, when all of the proper elements of damages are considered, is not excessive. Since the judgment was not excessive, the form of the verdict could not have been prejudicial to appellant. Appellant, at the time the verdict was rendered, made no objection to its form. He did not ask that the jury be required to return separate amounts for pain and suffering, and for loss of contributions. The widow and child, under the law, were entitled to the entire amount. They were the only persons having a pecuniary interest in the amount of damages recovered, and it could not prejudice appellant because these damages were returned in a lump sum. Appellant will be protected in the payment of the judgment as rendered, since all of the parties who had an interest in the same are represented in the suit. See *St. L., I. M. & S. Ry. Co. v. Hutchinson*, 101 Ark. 430.

Finding no reversible error, the judgment is affirmed.

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Clerk's Certificate.

SUPREME COURT,
State of Arkansas, ss:

I, P. D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Kansas City Southern Railway Company, a corporation, Plaintiff, vs. Sam E. Leslie, as Administrator of the Estate of Leslie Old, Deceased, Defendant, and also the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court at my office, at Little Rock, Arkansas, this June 24th, 1913.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

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Assignment of Errors, etc.

In the Supreme Court of Arkansas.

No. 2862.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
VS.

SAM E. LESLIE, Administrator of the Estate of Leslie Old,
Deceased, Defendant in Error.

Assignments of Errors and Prayer for Reversal.

Now comes the said plaintiff in error, and respectfully submits that in the record proceedings, decision and final judgment of the Supreme Court of the State of Arkansas in the above entitled matter, there is manifest error in this, to-wit:

1.

Because the Supreme Court of Arkansas denied to the plaintiff in error a right and immunity granted to it by a proper construction and application of the Act of Congress approved March 3rd, 1911, being the Act of Congress known as the act regulating the removal of causes from State to Federal Courts on the ground of diversity of citizenship, the said Supreme Court of Arkansas holding that under said Act of Congress as amended by the Act of April 5th, 1910, the plaintiff in error had no right to remove this cause from the State Court to the United States District Court, whereas by a proper construction of said Acts of Congress, the plaintiff in error did at the time of filing its petition and bond for removal, have the right of removing said cause from the State Court to the United States District Court, and if said act of Congress of April 5, 1910 prohibits a removal of said cause then said act of Congress is void because it deprives plaintiff in error of its rights and property contrary to the fifth amendment of the Constitution of the United States.

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2.

Because the Supreme Court of Arkansas denied to the plaintiff in error a right and immunity granted to it by a proper construction and application of the Act of Congress approved April 22nd, 1908, commonly known as the Employers' Liability Act, regulating the liability of common carriers, engaged in interstate commerce, and the amendments thereto, including the amendment approved April

5, 1910, in that said Supreme Court of Arkansas by its ruling, judgment and decision in this cause, refused to grant to this plaintiff in error a peremptory instruction, whereas under said Act of Congress and the amendments thereto this plaintiff in error was entitled both in the Little River Circuit Court of the State of Arkansas and in the Supreme Court of Arkansas, to a peremptory instruction in its favor.

3.

Because the said Supreme Court of the State of Arkansas denied to the plaintiff in error a right and a privilege and immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, known as the Employers' Liability Act and the amendments thereto, by refusing to hold that the Circuit Court of Little River County State of Arkansas, in the trial of said cause, committed error in refusing to give the following instruction, requested by the plaintiff in error, which was defendant's instruction No. 1, to-wit:

"The court instructs the jury to find the issues for the defendant."

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4.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 8, requested by the defendant, which is as follows:

"If it be true that there existed trouble in some cars in said train prior to the arrival of the same at Page, even the existence of that trouble will not authorize the jury to find that the air brake attachments were out of repair. Before the jury can find that the air brake attachments were out of repair, the plaintiff must prove by a preponderance of the evidence that such defects did exist, and even if the plaintiff proves by evidence that defects did exist in said air brake attachments, that proof will not authorize the jury to find that the violent movements and jerkings occurring as the train moved out of Page, if such violent movements and jerkings did occur, were caused by defects in the brake attachments. Before the jury would be authorized to find that defects existed in the air brake attachments, there must be evidence to prove that such defects existed, and the occurrence of the violent movements and jerkings, if such existed, as the train moved out of Page, cannot be considered as evidence in tending to show the existence of defects in the air brake attachments. In other words, the jury will not be permitted to find the existence of defects by proof of violent movements and jerkings, and then also find that the violent jerkings and movements, if they existed, were caused by defects in the air brake attachments."

5.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper con-

struction and application of said Act of Congress commonly called the Employers' Liability Act, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 11, requested by the defendant, which is as follows:

644 "Neither will the jury be authorized to find that the negligence of the engineer, if it existed, and defects in the air brake attachments, if such defects existed, combined and operated together to produce the violent and unusual jerks and movements of the train if such occurred. Proof that there was trouble on some of the cars with the air brake attachments, and proof that there were unusual and violent jerkings and movements of the train as it moved out of Page alone are not sufficient to prove that the engineer was negligent, and that such negligence caused the violent jerkings and unusual jerkings, if they existed, nor is such proof sufficient to authorize a finding that the air brake attachments were out of repair. Nor would such proof, if there is such, authorize the jury to find that the violent and unusual jerkings and movements of the train were caused by the negligence of the engineer, if it existed, combined with the defects in the air brakes, if such defects existed, and thereby caused the injury to the deceased. If the unusual and violent jerkings of the train, if there were such, were due to other causes, the plaintiff cannot recover."

a.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 12, requested by the defendant, which is as follows:

"There is no proof in this case tending to show that there was any defects in the grab-irons, hand-holds or ladders on National Zinc car numbered 17 or S. F. R. D. car numbered 6239. Plaintiff is therefore not entitled to recover, if at all, on any claim of the existence of defects in said ladders, grab-irons or hand-holds. The only ground upon which plaintiff claims a right to recover on account of hand-holds, grabirons or ladders, is that said refrigerator car last above named, and the tank car, were not provided with proper hand-holds, grab-irons or ladders. In other words, on that point it is alleged that the defendant did not use ordinary care in placing on said refrigerator car and on said tank car sufficient hand-holds. On that point the court instructs the jury that the defendant could not refuse to receive and transport said cars belonging to other transportation companies, or other owners, provided said cars had such hand-holds, ladders or grab-irons as are reasonably safe, or provided said cars were equipped with the usual and customary ladders, hand-holds and grab-irons that are found on cars of that kind in this part of the United States.

"If said tank car and said refrigerator car were provided with

such hand-holds, grab-irons and ladders as are customarily found on a considerable proportion of similar cars similarly constructed, the defendant was bound to receive said cars for transportation, and could not decline the same, and even if it be true that other companies and other cars have more hand-holds grab-irons or
645 ladders than said tank car number 17 and refrigerator car numbered 6239 had, nevertheless the fact that 50 per cent of cars similarly constructed and used, or the fact that even 75 per cent of similar cars had additional hand-holds, including hand-holds on the end, would not authorize the defendant to refuse said cars, because not properly equipped, nor would it authorize the plaintiff to recover herein on the ground of alleged negligent use of said cars with the hand-holds which said cars had thereon."

7.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 13, requested by the defendant, which is as follows:

"The owners of said tank and refrigerator cars had the right to have said cars transported, if said tank car and said refrigerator car were equipped with the hand-holds provided by the Interstate Commerce Act of Congress and the rules and regulations of the Interstate Commerce Commission, and if said cars were equipped as provided by the Interstate Act of Congress, and as required by the rules and regulations of the Interstate Commerce Commission, the presumption would be that said cars were properly equipped and the jury would not be authorized to find that the defendant was negligent in using said cars on the ground that said cars did not have end ladders or other grab-irons or ladders. In other words, if said cars had the grab-irons, ladders and hand-holds as now required by the Act of Congress, and by the rules of the Interstate Commerce Commission, that fact was sufficient to authorize and require the defendant to receive and transport said cars, and it cannot be held liable on the allegation that there were insufficient hand-holds, ladders or grab-irons on said cars, by proving that it would have been safer to have placed on said tank car and on said refrigerator car end hand-holds or other additional hand-holds to those already on said cars."

8.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 15, requested by the defendant, which is as follows:

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"Under the Interstate Commerce Act of Congress of April 22, 1908, and of the amendments thereto, and under the rules and regulations of the Interstate Commerce Commission, and under the Act of Congress of April 14th, 1910, and under the Act of Congress known as the Safety Appliance Act, and under the Act of Congress approved April 14th, 1910, and the amendments thereto of June 30th, 1912, and March 4th, 1911, and under the rules and regulations of the Interstate Commerce Commission, based upon said acts of Congress the defendant in this cause was not required to place on National Zinc Company tank car numbered 17 any hand-holds, grab-irons or ladders than were upon the same, and it was not negligent for the defendant to have said car in said train, and to use the same with the hand-holds thereon, and the action of the defendant in using said car thus equipped, is not negligence, and no recovery can be based thereon in favor of the plaintiff."

9.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 16, requested by the defendant, which is as follows:

"Under the Act of Congress of April 14th, 1910, as amended on March 4th, 1911, and June 30th, 1912, and under the regulations of the Interstate Commerce Commission, duly adopted, and based upon said Acts of Congress, the defendant in this cause had the right to accept, receive and transport refrigerator car S. F. R. D. and numbered 6239, with the hand-holds, ladders and grab-irons thereon, as described in the evidence. Under said Acts of Congress and the regulations of said Commission, it was not negligent for the defendant to receive said refrigerator car and to transport the same without any hand-holds or without other hand-holds than those shown to be thereon by the testimony and the plaintiff in this case is not entitled to recover upon the allegation that said refrigerator car did not have end ladders, grab-irons or handholds thereon, and no recovery can be based upon that allegation of negligence."

10.

"Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 18, requested by the defendant, which is as follows:

"It is also alleged that there were in the train coal cars and other low cars, which could have been placed next to the high refrigerator car, and that, if that had been done, the deceased might

not have been injured. The court instructs the jury that the plaintiff cannot recover upon that allegation in the complaint."

11.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to give instruction numbered 88, requested by the defendant, which is as follows:

"Under the Interstate Commerce Act of Congress and the amendments thereto and the regulations made in pursuance thereof all railroads have until July 1, 1916, to place hand-holds or ladders on the ends of cars, and therefore it is not negligence herein which would entitle plaintiff to recover, for defendant to have said refrigerator car and tank car without having end ladders or grab-irons thereon, even though the jury should find that it was safer to the brakemen to have the end ladders, and even though it should appear that a majority of refrigerator and tank cars have end ladders now."

12.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress approved April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County in the trial of said cause, committed error in giving instruction numbered 1 on behalf of the defendant in error, which said instruction is as follows:

"You are instructed that the uncontradicted testimony in this case shows that at the time of his injury, plaintiff's deceased was engaged by the defendant on an interstate train as a brakeman on said train and was engaged in interstate commerce. In such cases, the law provides among other things that every common carrier by railroad, while engaged in interstate commerce, shall be liable in

648 damages to every person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his personal representative for the benefit of the surviving widow or children of such employee for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, etc. Therefore, if you find from a preponderance of the evidence that deceased's injury and death was caused in whole or in part by the negligence of the defendant, or any of its employees as set out in the complaint, you will find for the plaintiff, unless you further find the deceased assumed the risk or was guilty of such contributory negligence as will bar a recovery as hereinafter explained."

13.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, approved April 22nd, 1908, and the amendments thereto by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 2 on behalf of the defendant in error, which said instruction is as follows:

"You are instructed that it was the duty of the defendant to inspect all the cars put into its train before the train was started on its trip, and it was the duty of the inspector to see that the cars put into the train were properly equipped with such safety appliances as you may find from the evidence were in common use by the railroads in this section of the country and necessary to prevent exposing the brakemen to unusual and unnecessary hazards in going from car to car while the train was in motion. If you find from the evidence that grab-irons, hand-holds or ladders on the ends of the freight cars for the use of the brakeman going from car to car while the train was in motion, in the discharge of their duties, were commonly and generally used by the railroads in this section of the country, and that the same are necessary to enable the brakeman to go from car to car while the train is in motion in the discharge of their duty, without unusual and unnecessary hazards, and that the defendant permitted a car without adequate equipment of such grab irons or ladders to be put in its train and that the injury and death of plaintiff's deceased was caused in whole or in part from the lack of such equipment, then the defendant is liable in this case, unless the deceased assumed the risk thereof or was guilty of such contributory negligence as will bar a recovery as hereinafter explained."

649

14.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, approved April 22nd, 1908, and the amendments thereto by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause, committed error in giving instruction numbered 2½, on behalf of the defendant in error, which said instruction is as follows:

"Negligence is the doing of something which a man of ordinary prudence would not do, or the failure to do something which a man of ordinary prudence would do under similar circumstances."

15.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress, approved April 22nd, 1908, and the amendments thereto by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 3 on

behalf of the defendant in error, which said instruction is as follows:

"If you find from a preponderance of the evidence that decedent was injured in attempting to pass from the refrigerator car onto and over the tank car, as set out in the complaint, and if you further find, that in making up of said train, a person of ordinary caution and prudence, in the exercise of ordinary care, would have placed cars on either end of said oil or tank car, equipped with such appliances as would have materially lessened the hazards or danger in passing onto and over said tank car and that defendant, in the exercise of ordinary care could have done so and negligently failed to do so and that such failure in whole or in part was the cause of decedent's injury and death, then you will find for the plaintiff, unless you further find that decedent assumed the risk of said danger or was guilty of such contributory negligence as will bar a recovery as hereinafter defined."

650

18.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress approved April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 4, on behalf of the defendant in error, which said instruction is as follows:

"If you find from a preponderance of the evidence that the employees of the defendant company in charge of defendant's train at the time of decedent's injury, carelessly and needlessly permitted the train to jerk or lurch violently and unusually and unnecessarily hard while said train was passing out of Page and that this jerking and lurching could have been prevented by the exercise of ordinary care on the part of said employees, and if you further find that said jerking and lurching was the cause either in whole or in part of the deceased's injury and death, then you will find for the plaintiff."

17. .

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress, approved April 22nd, 1908, and the amendments thereto by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 5 on behalf of the defendant in error, which said instruction is as follows:

"If you find from a preponderance of the evidence that decedent received his injury and death on account of the negligence of the defendant in either of the respects set forth in the preceding instructions, if you find there was negligence of the defendant in either respect set forth, or a concurrence of alleged acts of negligence, then the defendant is liable unless decedent assumed the risk or was guilty of such contributory negligence as will defeat a recovery as hereinafter defined."

651

18.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, approved April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 6 on behalf of the defendant in error, which said instruction is as follows:

"While an employee assumes all the risks ordinarily incident to his work, yet he does not assume the risks of negligence on the part of the employer or the employer's other servants. If the employer or its other servants negligently failed to perform their duties to an employee, then their negligence in such respect is not a risk assumed by the employee, unless he continues in such employment with a full knowledge of such negligence and appreciates the danger arising therefrom."

19.

Because the Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress approved April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 7, on behalf of the defendant in error, which said instruction is as follows:

"You are further instructed that if you should find from the evidence that decedent was himself guilty of any negligence which contributed to his injury and death; provided you find the defendant liable, such negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to the decedent."

20.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, approved April 22nd, 1908, and the amendments thereto by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 8 on behalf of the defendant in error, which said instruction is as follows:

"In determining whether the decedent was guilty of a contributory negligence, you must determine whether under all the circumstances presented to him at the time, he acted as a man of ordinary prudence and care would have acted. If the act of the deceased in going from one car to another while the train was in motion was dangerous and the danger was known and appreciated by him, and is one of which many men are in the habit of assuming and prudent men are earning a living in work, exposing them to these risks, then, one who assumes the risk cannot be said to be guilty of contributory negligence if having in view the risks assumed he uses

care reasonably commensurate with the risk to avoid injurious consequences."

21.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, approved April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 9 on behalf of the defendant in error, which said instruction is as follows:

"You are instructed that it devolves upon the plaintiff to establish not only the negligence complained of, but that such negligence was the cause of the injury. The causal connection must be established by evidence as a fact and not to be left to mere speculation and conjecture. This rule does not, however, require that there must be direct proof of the fact itself, but it may be established by circumstantial evidence, that is by such facts and circumstances of such a nature and such connection and relation to each other, that the conclusion therefrom may be fairly and reasonably inferred."

653

22.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, approved April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of said cause committed error in giving instruction numbered 10 on behalf of the defendant in error, which said instruction is as follows:

"If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff."

23.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd,

1908, commonly known as the Employers' Liability Act, as applied to common carriers, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in giving instruction numbered 1 on the court's own motion, which said instruction is in words and figures as follows:

"In the outset, you are instructed that the burden of proof is upon the plaintiff to prove the manner and cause of the death sued for, and that it resulted proximately; that is, directly from one or more of the alleged acts of negligence in the complaint.

"If from the evidence it appears equally that it may have, or may not have been caused, as alleged in the complaint then it is not necessary to go further, plaintiff in that event could not recover, and you should find for the defendant."

24.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, commonly known as the Employers' Liability Act, as applied to common carriers, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in giving instruction numbered 2 on the court's own motion, which said instruction is in words and figures as follows:

"If the jury should find that the death of deceased resulted from an unavoidable accident, or from his own negligence alone, or occurred from the negligence of the defendant other than the negligence alleged in the complaint, then the plaintiff would not be entitled to recover, and your verdict should be for the defendant."

25.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, commonly known as the Employers' Liability Act, as applied to common carriers, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in giving instruction numbered 3 on the court's own motion, which said instruction is in words and figures as follows:

"You are instructed that negligence cannot be inferred from the mere happening of an accident, and that if the circumstances relied upon by the plaintiff to show negligence in this case are consistent with ordinary care on the part of the defendant, then the charge of negligence will fail for want of proof, and in that case, you will find for the defendant."

26.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, commonly known as the Employers' Liability Act as applied to common carriers, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the

trial of this cause committed error in giving instruction numbered 4 on the court's own motion, which said instruction is in words and figures as follows:

"You are instructed that the mere fact that the deceased was killed at the time and place alleged in plaintiff's complaint does not warrant a recovery, and in order for plaintiff to recover against defendant, it is necessary for the plaintiff to go further and show by a preponderance of the evidence that said defendant company was not only guilty of the negligence alleged in the complaint, but that said negligence proximately contributed to the death of plaintiff's intestate, but if the evidence fails to show this, then it is your duty to find for the defendant."

27.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, commonly known as the Employers' Liability Act, as applied to common carriers, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in giving instruction numbered 5 on the court's own motion, which said instruction is in words and figures as follows:

"If the evidence in this case fails to establish to your satisfaction the negligent manner in which deceased was killed, as alleged in the complaint, then the court tells you, as a matter of law, that you cannot presume negligence on the part of the defendant company and that it would be your duty to return a verdict for the defendant."

28.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, commonly known as the Employers' Liability Act, as applied to common carriers, by refusing to hold that the 656 Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in giving instruction numbered 6 on the court's own motion, which said instruction is in words and figures as follows:

"The deceased, Olds, in accepting and continuing in the employment for which he was engaged as brakeman, assumed all ordinary and usual risks and perils incident thereto; he assumed all the obvious risks of the work in which he was engaged and also the risks he knew existed, as well as those, which, by the exercise of reasonable care, he might have known existed."

29.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, commonly known as the Employers' Liability Act, as applied to common carriers, by refusing to hold that the Circuit

Court of Little River County, Arkansas, in the trial of this cause committed error in giving instruction numbered 7 on the court's own motion, which said instruction is in words and figures as follows:

"By his contract of service with the defendant he agreed to bear the risk of all such dangers, and if his death resulted proximately from any one of such dangers plaintiffs cannot recover in this action."

30.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, commonly known as the Employers' Liability Act, as applied to common carriers, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in giving instruction numbered 8 on the court's own motion, which said instruction is in words and figures as follows:

657 "It is the law that where an employee knows the methods that are adopted in doing the work for which he is engaged and the place furnished in which the work is to be done, and knows and appreciates the dangers thereof, if any, and accepts and continues in the employment under such conditions, although they may involve greater danger than would other conditions and places for work he assumes the risk of the dangers that may result therefrom, and there can be no recovery for the death or injury thereby occasioned."

81.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, erred in overruling defendant's motion to strike out certain parts of the complaint.

32.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the circuit Court of Little River County, Arkansas, erred in overruling the motion of the plaintiff in error to make the complaint more definite and certain.

33.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that

the Circuit Court of Little River County erred in over-ruling the demurrer of the plaintiff in error to the complaint.

658

34.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, erred in over-ruling the motion of plaintiff in error for a continuance of this cause.

35.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in admitting over objection, the evidence of Harry Eames, L. S. Monroe, and T. J. Clayton, and other witnesses, to the effect that said witnesses had had some trouble with the air appliances on the train in which the deceased, Leslie Old, was alleged to have been killed.

36.

Because the Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in admitting in evidence the testimony of the witness, Frank Sweeney, Richard Lee, H. W. Hopson, R. Y.

Secrest and other witnesses, to the effect that the railroads in the United States used end ladders on 50 per cent to 75 per cent of refrigerator cars and box cars.

359

37.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in excluding the evidence of the rules of the Interstate Commerce Commission regulating the placing of hand holds on cars.

38.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto by refusing to hold that

the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in permitting and requiring the witness T. J. Clayton to testify in substance that if there was any violent jerking in going out of Page, such jerking was due to the negligence of the engineer.

39.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in refusing to exclude the evidence of Jim Coulter.

660

40.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto by refusing to hold that the Circuit Court of Little River County, Arkansas, erred in admitting the testimony of L. S. Monroe, Harry Eames and other witnesses, tending to show that it would have been better if a coal car or other high car had been next to the refrigerator car.

41.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, and the amendments thereto by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in excluding the testimony of A. C. Holt, V. V. Blakely, E. B. Blakely and G. A. Tucker as to the admissions and statements of Leslie Old, the deceased, to the effect that he, the said Leslie Old, was injured because he attempted to catch the train and slipped.

42.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908 and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, in the trial of this cause committed error in excluding, after it was once admitted, the evidence of A. C. Holt, V. V. Blakely, E. B. Blakely and G. A. Tucker, as to the admissions of Leslie Old, the deceased, to the effect that he, the said Leslie Old, was injured because he attempted to catch the train and slipped, said statements being admitted and afterwards, on motion of defendant in error, excluded.

661

43.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, erred in admitting the evidence of A. C. Holt and the other witnesses, tending to show that the deceased was conscious.

44.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress of April 22nd, 1908, by refusing to hold that the Circuit Court of Little River County, erred in not setting aside the verdict because excessive, and in holding that said verdict was not excessive.

45.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto, by holding that said verdict was not excessive, and also by holding that said verdict was in due and legal form, and in holding that the child of the deceased was entitled to recover for years after his maturity, and by holding that it was unnecessary that the verdict of the jury should show the exact amount recovered by the widow and the exact amount recovered by the child.

662

46.

Because the Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress in deciding and holding that the evidence in this cause under said Act of Congress raised a jury question, and that the cause had been properly submitted to a jury, and that there was evidence to support and uphold the verdict of the jury, whereas by a proper construction of said Act of Congress the evidence in this cause is wholly insufficient to warrant the submission of the cause to a jury, and on said evidence the said court should have directed a verdict for the plaintiff in error, and should have rendered a judgment in favor of the plaintiff in error.

47.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and immunity granted to it by a proper construction and application of said Act of Congress of April 22nd, 1908, and the amendments thereto, by refusing to hold that the Circuit Court of Little River County, Arkansas, erred in overruling the motion of the plaintiff in error for a new trial.

48.

Because the said Supreme Court of Arkansas in its decision and opinion denied to the plaintiff in error rights and immunities granted to it, and arising under a proper construction and application of the said Act of Congress of April 22nd, 1908, and the amendments thereto, and the acts commonly called the Safety Appliance acts, and the amendments thereto, by erroneously holding:

a. That under the Acts of Congress heretofore referred to this cause could not be removed, and in holding said act of Congress of April 5, 1910, denied a right of removal and in not holding said act of Congress void because it denied to plaintiff in error its rights and property and the equal protection of the laws. Contrary to amendment number five of the Constitution of the United States.

663 b. By erroneously holding that there was evidence in the cause sufficient to warrant a jury to find that the deceased, Leslie Old, fell between the refrigerator car and the National Zinc car by reason of the absence of handholds and that his fall was due to the negligence of the plaintiff in error.

c. By erroneously holding that the plaintiff in error was not entitled to a new trial.

d. In erroneously holding that the facts as shown by the evidence, are the facts as stated in the opinion of said Supreme Court of Arkansas.

e. In erroneously holding that a new trial should not have been granted to the plaintiff in error.

f. In erroneously holding that there was no error in denying the petition of plaintiff in error for a removal of this said cause to the United States Court.

g. In erroneously holding that the complaint stated a cause of action.

h. In erroneously holding that there was no error in over-ruling the motions of the plaintiff in error to strike out a certain portion of the complaint, and to make said complaint more definite and certain, and in over-ruling the demurrer of plaintiff in error to said complaint.

i. In erroneously holding that there was no error in over-ruling the motion of the plaintiff in error for a continuance.

j. In erroneously holding that the plaintiff in error received and was accorded a fair trial.

k. In erroneously holding that the evidence tending to show there was trouble with the air appliances before the said train arrived at the station of Page, was admissible.

664 l. In erroneously admitting evidence of witnesses to show that a large per cent of refrigerator cars and other cars had end ladders and hand holds on the ends of said cars.

m. In erroneously holding that it was not error to exclude the rules of the Interstate Commerce Commission.

n. In erroneously holding that it was not error to exclude the evidence of A. C. Holt, V. V. Blakely, E. B. Blakely, G. A. Tucker, and other witnesses, as to the statements of Leslie Old, to the effect that he was injured, because he attempted to catch the train and slipped.

o. In erroneously holding that the application of the deceased, Leslie A. Old, was inadmissible.

p. In erroneously holding that the verdict was not excessive.

q. In erroneously holding that it was unnecessary that the verdict should show the amount recovered by the widow and the amount recovered by the child.

r. In erroneously holding that the child was entitled to recover large sums after he would have arrived at the age of his majority.

s. In erroneously refusing to hold that a verdict should have been directed for the defendant.

t. In erroneously holding that the evidence showed a causal relation between the alleged acts of negligence and the death of Leslie Old.

u. In erroneously holding that under the Employers' Liability Act of Congress of April 22nd, 1908, and the amendments thereto, the plaintiff as administrator, was entitled to recover damages by way of compensation, as well as for pain and suffering, and in holding that the plaintiff might recover damages both for compensation, and damages for pain and suffering of the deceased.

665 v. In erroneously holding that the said Act of Congress created a right of action for the benefit of the widow and next of kin, wholly independent of the right of action given to the injured person, and in holding that the compensatory damages provided for in said Act of Congress might be increased by damages for conscious pain and suffering.

w. In erroneously holding that under the actions and rights of actions created by said Act of Congress of April 22nd, 1908 and the amendments thereto, the rules of evidence as provided in the state statutes must control, whereas under a proper construction of said Acts of Congress, the rules of evidence of the State Courts do not control.

x. In erroneously holding that no specific objection was made to the rulings of the court in giving and refusing instructions, and that such specific objections were not abstracted.

49.

Because the said Supreme Court of Arkansas denied to the plaintiff in error a right and an immunity granted to it by said Act of Congress of April 22nd, 1908, and the amendments thereto, by denying to the plaintiff in error a re-hearing of said cause, and by refusing to sustain its motion for a new trial.

Wherefore, plaintiff in error prays that the final decision of the Supreme Court of Arkansas in this cause be reversed by the Supreme Court of the United States, and that this cause be dismissed or remanded.

FRANK H. MOORE,
SAMUEL W. MOORE,
JAMES B. McDONOUGH,

*Attorneys for the Kansas City Southern Railway
Company, the Plaintiff in Error.*

Filed June 2, 1914. P. D. English, Clerk.

666

Petition for Writ of Error.

In the Supreme Court of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in
Error,

vs.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
Defendant in Error.*Petition for Writ of Error.*UNITED STATES OF AMERICA,
State of Arkansas:

To the Honorable Chief Justice of the Supreme Court of Arkansas:

The petition of The Kansas City Southern Railway Company, plaintiff in error, respectfully shows that on the 18th day of May, 1914, the Supreme Court of the State of Arkansas denied the petition for a rehearing, and rendered a final judgment against your petitioner, The Kansas City Southern Railway Company, in a certain case wherein Sam E. Leslie, Administrator of the Estate of Leslie Old, deceased, was plaintiff, and your petitioner was defendant, for the sum of Eighteen Thousand Dollars (\$18,000.00) and costs, as will appear by reference to the records and proceedings in said cause; that said Court is the highest court of said state in which a decision could be had, and your petitioner claims the right to remove said judgment and cause to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, and under Section 237 of the Judicial Code of the United States enacted by Act of Congress of March 3rd, 1911, Chapter 231, 36 United States Statutes at Large, 1156, because your petitioner claims that the said judgment and the decision of the said

667 Supreme Court of Arkansas deprives your petitioner of a right, privilege and immunity granted and belonging to it under certain Acts of Congress, to-wit: Act of April 22nd, 1908, 35 Statutes at Large, 65, and the amendments thereto, including the Act of April 5, 1910, said first named act being entitled "An Act relating to the Liability of Common Carriers by Railroads to their Employees in certain Cases", including all amendments thereto; also Section 28 of the Act of March 3rd, 1911, commonly known as the Judicial Code, and other Sections of said Act, relating to the removal of causes to the United States Courts from State Courts; and also amendments numbered 5 and 14 to the Constitution of the United States, and also the Act of Congress of March 2nd, 1893, known as the Safety Appliance Act, and all amendments thereto; and also an Act of Congress entitled "An Act to regulate Commerce" approved February 4th, 1887, and all acts amendatory thereof, including the Act of April 29th, 1906 and all amendments thereto, and

Your petitioner claims that it is not liable in said cause, because

by a proper construction of said Acts of Congress there is no liability against your petitioner in this said cause. Your petitioner claims that under said Acts of Congress your petitioner was entitled to a directed verdict in its favor, in the Circuit Court of Little River County, State of Arkansas, and also in the Supreme Court of the State of Arkansas, on the grounds, and for the reasons set forth in the assignment of errors, which is herewith filed. Your petitioner claims that under a proper construction of said Acts of Congress, it has a right, privilege and immunity which right, privilege and immunity have been denied your petitioner by said Supreme Court of Arkansas, all of which appears by the record of the proceedings in said cause, which is herewith submitted, and your petitioner herewith offers proper supersedeas bond.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas, and your petitioner will ever pray. Assignment of errors herewith filed.

THE KANSAS CITY SOUTHERN RAIL-
WAY COMPANY,

By S. W. MOORE,

F. H. MOORE, AND

JAMES B. McDONOUGH,

Attorneys for Petitioner.

669

Allowance of Writ of Error.

Let the writ of error issue as prayed upon execution of bond in sum of judgment, cost and damages, when approved to act as supersedeas.

June 2, A. D. 1914.

E. A. McCULLOCH,

*Chief Justice of the Supreme Court of the
State of Arkansas, Now and at the Time
of the Rendition of said Judgment.*

Filed June 2d 1914. P. D. English, Clerk.

670

Bond.

In the Supreme Court of Arkansas.

UNITED STATES OF AMERICA:

#122.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error.

VS.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
Defendant in Error.

Supersedeas Bond.

Know all men by these presents, That we, The Kansas City Southern Railway Company, as principal, and the American Surety Company of New York as surety, are held and firmly bound unto Sam E. Leslie, Administrator of the Estate of Leslie Old, deceased, in the amount of the judgment, cost, interest and damages as hereinafter provided.

Sealed with our seals and dated this 29th day of May, 1914.

The above bond is upon this express condition, to-wit:

Whereas, The Kansas City Southern Railway Company has taken a writ of error from the judgment of the Supreme Court of the State of Arkansas, rendered at the present term of said court and on the 18th day of May, 1914, in favor of the Defendant in Error, as Administrator, for the sum of Eighteen Thousand Dollars (\$18,000.00), and interest and costs, and said judgment being rendered against the plaintiff in Error; and

671 Whereas, the said The Kansas City Southern Railway Company has prosecuted a writ of error and is prosecuting a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the Supreme Court of Arkansas in the above entitled cause; and

Whereas, The said The Kansas City Southern Railway Company desires to supersede the said judgment:

Now, therefore, The above named Principal and Surety hereby covenant to and with the above named defendant in error, Sam E. Leslie, Administrator, that the said The Kansas City Southern Railway Company will pay unto the said defendant in error all costs and damages that may be adjudged against the plaintiff in error, and in the event of the failure of said plaintiff in error to prosecute its said writ of error to a final judgment in the Supreme Court of the United States, if said writ of error shall, for any cause, be dismissed, or, if on the hearing of the said writ of error in the Supreme Court of the United States, the judgment of the Supreme Court of Arkansas shall be affirmed, then if the said The Kansas City Southern Railway Company shall fully pay said judgment and fully perform all the orders of the said Court, then this obligation shall

be null and void, otherwise the same shall remain in full force and effect.

Witness our hands this 28th day of May, 1914.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

By JAMES B. McDONOUGH, *Its Attorney.*
(Signed) AMERICAN SURETY COMPANY OF
NEW YORK,

[SEAL.] By A. C. CUNCKEL, *Resident Vice-President.*

Attest:

HARRY K. ALBERS,
Resident Assistant Secretary.

Approval of Bond.

Approved this 2nd day of June, 1914.

E. A. McCULLOCH,
*Chief Justice of the Supreme Court of Arkansas,
Now and at the Time of the Rendition of said
Judgment.*

Filed June 2d, 1914. P. D. English, Clerk.

672

Writ of Error.

UNITED STATES OF AMERICA, *set:*

In the Supreme Court of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
Defendant in Error.

Writ of Error and Allowance Thereof.

Writ of Error.

UNITED STATES OF AMERICA, *set:*

The President of the United States of America to the Honorable
the Judges of the Supreme Court of the State of Arkansas,
Greeting:

Because, in the record and proceedings, as also in the rendition of
the judgment of a plea, which is in the said court before you, or some
of you, being the highest court of law or equity of the said state, in
which a decision could be had in said suit between The Kansas City
Southern Railway Company, defendant and plaintiff in error herein,

and Sam E. Leslie, Administrator of the Estate of Leslie Old, Deceased, plaintiff below and defendant in error herein wherein was drawn in question the construction of certain Acts of Congress and Statutes of the United States and the Constitution of the United States, and the decision was against the right, privilege and immunity specially set up and claimed under said Acts of Congress and Statutes of the United States, manifest error hath happened to the great damage of the said The Kansas City Southern Railway Company, plaintiff in error herein, as by its complainant appears.

673 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington City on the 2nd day of July, 1914, next, in said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 2nd day of June, A. D. 1914.

[The Seal of the District Court, East. Dist. Ark., Western Division, U. S. A.]

SID B. REDDING,
Clerk of the District Court of the United
States for the Eastern District of Arkan-
sas, Western Division Thereof,
By W. P. FEILD, Jr.,
D. C., Deputy Clerk.

674 In the Supreme Court of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
SAM E. LESLIE, Administrator of the Estate of Leslie Old, Deceased,
Defendant in Error.

Allowance of Writ.

Allowed by:

E. A. McCULLOCH,
Chief Justice of the Supreme Court of the State
of Arkansas Now and at the Time of the
Rendition of said Judgment.

Filed June 2nd, 1914. P. D. English, Clerk.

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Statement of Clerk.

SUPREME COURT,

State of Arkansas, ss:

I, P. D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on June 2, 1913, in the matter of The Kansas City Southern Railway Company, a corporation, versus Sam E. Leslie as Administrator of the Estate of Leslie Old, Deceased.

1. The original bond of which a copy is herein set forth.

2. Copies of the writ of error, as herein set forth—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 24, 1913.

[Seal Supreme Court, State of Arkansas.]

P. D. ENGLISH,

Clerk Supreme Court of Arkansas.

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*Citation.**Original.*

UNITED STATES OF AMERICA,

State of Arkansas, act:

To Sam E. Leslie, Administrator:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Arkansas, wherein The Kansas City Southern Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edgar A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas, this 2nd day of June, A. D. 1914.

E. A. McCULLOCH,

*Chief Justice of the Supreme Court of Arkansas
Now and at the Time of the Rendition of said
Judgment.*

Attest:

P. D. ENGLISH, *Clerk,*By ———, *Deputy Clerk.*

Acceptance of Service.

The Defendant in Error, Sam E. Leslie, Administrator, hereby accepts service of the above citation, and acknowledges the receipt of a copy of the same, this 2nd day of June, 1914.

SAM E. LESLIE, *Admr.*,

Defendant in Error,

By W. P. FEAZEL,

Attorneys for Defendant in Error.

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Return to Writ.

UNITED STATES OF AMERICA,

Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this June 24th, 1913.

[Seal Supreme Court, State of Arkansas.]

PEYTON D. ENGLISH,

Clerk Supreme Court of Arkansas.

Costs Circuit Court	\$453.15
" Supreme Court	106.50
Transcript to Sup. Court U. S., paid by K. C. So. R. R. Co..	138.50

Attest.

PEYTON D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 24,282. Arkansas Supreme Court. Term No. 538. The Kansas City Southern Railway Company, plaintiff in error, vs. Sam E. Leslie, administrator of the estate of Leslie Old, deceased. Filed June 29th, 1914. File No. 24,282.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1914.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

SAM E. LESLIE, Administrator of the Estate of
LESLIE A. OLD, Deceased, *Defendant in Error.*

} No. 538.

In Error to the Supreme Court of the State of Arkansas.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a suit, brought by the defendant in error, Sam E. Leslie, as administrator of the estate of Leslie A. Old, deceased, to recover damages on behalf of the widow and child of Old, against The Kansas City Southern Railway Company, plaintiff in error herein, on account of the alleged wrongful death of Old, at Page, Oklahoma, on March 24, 1913. As is shown by the complaint (Rec., 6-10), the action is based solely upon the Federal Employers'

Liability Act, as amended by the Act of April 5, 1910. Sam E. Leslie will be referred to as the plaintiff, and The Kansas City Southern Railway Company as the defendant. Briefs have been filed in the case upon a motion to dismiss or affirm. Defendant's attorneys have also filed a brief, as *amici curiae*, on the subject of the measure of damages under the amended Employers' Liability Act, in case No. 166, entitled *St. Louis & San Francisco Railroad Co. v. Conarty*.

PLEADINGS.

The complaint is voluminous, but the plaintiff, in his brief on the motion to dismiss or affirm (pp. 4-7), adopts the following summary of the complaint made by the Supreme Court of Arkansas in its opinion, (Rec., 403-405):

This is a suit brought by the appellee, as the administrator of the estate of Leslie A. Old, deceased, for the benefit of the widow and her infant child, under the Federal Employers' Liability Act and its amendment of April 5, 1910.

The suit is brought for the loss of contributions to the widow and child by reason of the death of Old and also for the conscious pain and suffering which Old endured before his death, which under the Act survived to the administrator for the benefit of his widow and child.

The complaint, after alleging the incorporation of the appellant, and that it was engaged in Interstate Commerce, and after alleging that Leslie A. Old was in the employment of the appellant as swing-brakeman, on a train that was being operated at the time, in Interstate Commerce, alleged "That his work required him to look after, and pass over the tops of the cars, composing the middle section of said train; that there were two box cars or refrigerator cars of equal height and immediately in front of these two cars, was an oil tank car; that the floor of this car was seven or eight feet lower than the run-way on top of the refrigerator car immediately in its rear; that there were no ladders or grab irons or hand holds on the end of the box or refriger-

ator car to enable the brakeman to safely get from the top of the box or refrigerator car on to the platform or runway of the oil car immediately in front of it; except a ladder or grab iron down the side of the refrigerator car some distance from the end thereof; that the absence of these grab irons, handholds or ladders down the end of the box car made it unnecessarily hazardous for the brakeman to pass from the top of the box or refrigerator car to the platform or walk-way of the oil tank car immediately in front of it; that there were no grab irons or hand holds on the end of the oil car, or tank car, immediately in front of the refrigerator car, or any other appliances thereon to enable the brakeman in passing from the rear car to the oil car to hold to and steady himself while making the passage.

The complaint further alleged that the engineer of said train was negligent on the occasion of deceased's injury in permitting his air to become out of order, or in carelessly manipulating his air in such a manner that said train was caused to jerk violently and unusually, which jerking contributed to the injury of plaintiff's deceased, as aforesaid.

There were further allegations in the complaint to the effect that the defendant was negligent in making up said train, in carelessly and negligently placing the oil car or tank car next to the box or refrigerator car, knowing the platform or walk-way on the oil car was some six or seven feet lower than the top of the box or refrigerator car, without providing some means or appliances on both the refrigerator car and the oil car, which would enable brakemen to get from one to the other without any unnecessary danger.

There is an allegation to the effect that the acts of negligence complained of were unknown to the plaintiff's deceased and by reason of his inexperience as a brakeman he was unable to and did not appreciate the danger arising from said acts of negligence. There was a further allegation to the effect that by reason of the absence of such hand-holds or ladders, on the end of said box car, or other proper appliances, which would have enabled deceased to safely go from the top of said box car to said oil car, concurring with the unusual and violent jerking of the train as it passed out of

4

Page, deceased was unable to get from the top of the box car to the oil car, and while in the effort to do so, and while in the exercise of due care himself, he was thrown between the ends of said cars, or fell between the ends of said cars, and received the injuries which were specifically described.

The complaint concluded with a prayer for damages on account of the pain and suffering in the sum of \$10,000, and for loss of contributions in the sum of \$15,000, and for a judgment in the total sum of \$25,000.

The defendant filed a motion to require the plaintiff to make his complaint more definite and certain, and a motion to strike, which were overruled, and defendant duly excepted, (Rec. 33-38).

The defendant, in its answer, denied the allegations of the complaint, and set up the defenses of contributory negligence and assumption of risk, (Rec., 11-16).

As we contend that a verdict should have been directed in favor of defendant on account of insufficiency of the evidence, we present a statement of the evidence.

EVIDENCE.

Old's Personal Characteristics and Experience.

At the time of the accident, Old was a bright, intelligent man, between 24 and 25 years old. He was six feet tall, and large, strong, and active, (Rec., 72, 147-148). Old had been employed as brakeman on the defendant's railroad for about five months, (Rec., 149). Prior to that time, Old had worked as fireman for the M. D. & G. railroad for about six months. He had also worked as engine watchman or hostler, for the Iron Mountain, about four years prior to the accident (Rec., 147). Old's written application to the defendant for employment, in which Old stated that he had worked as brakeman for the M. D. & G. railroad from November 3, 1910, to October 8, 1912, was admitted in evidence and afterward excluded over defendant's objection and exception, (Rec. 182).

Testimony Regarding the Happening of the Accident.

On the date of the accident, Old was serving as swing or middle brakeman on a north bound through freight train, engaged in interstate commerce. Old's run was from DeQueen, Arkansas, to Heavener, Oklahoma. The train left DeQueen, Arkansas, the terminal, in the forenoon of March 24, 1913, (Rec. 40, 67-68, 229), and, at the time of its departure from DeQueen, consisted of fifty-three cars, two of which were set out before Page, Oklahoma, the point at which the accident occurred, was reached (Rec., 49).

The train arrived at Page at about 8:20 o'clock, p. m., and remained there about ten or fifteen minutes (Rec., 68, 71, 162). In fixing the position of the train while stopping at Page, it was variously estimated that the caboose was twelve or fourteen (Rec., 68, 73) to approximately twenty or twenty-five car lengths south of the door of the station (Rec., 52, 227). In other words, about half or one-third of the train was south of the station (Rec., 73). The station at Page is on the east side of the track (Rec. 95, 154), and a gravel platform extends about seventy or eighty feet south of the station, and an equal distance north of it (Rec. 91).

It was after dark when the train arrived at Page (Rec. 63, 73) and a man could not be recognized unless a light shone on his face (Rec., 56, 73).

The train stopped at Page for orders, and Eames, the conductor, Smith, the head brakeman, and Old, went into the station (Rec. 51). The head brakeman left the station in three or four minutes in order to take the orders to the engineer; then the conductor left the station (Rec. 51, 172, 226). When the head brakeman handed the engineer the orders, the latter sounded the whistle, and the conductor, who was standing on the platform, gave the proceed or highball signal (Rec. 66). The head brakeman told the engineer they were ready to go, and gave a signal with his lantern. He then got on the car next to the engine and

began turning up the retainers in connection with the air brakes (Rec., 228). He wanted to get this work done before the cars were under full headway.

Old remained in the station a short while, a minute to three minutes, after the conductor left the station (Rec., 51, 223).

While Old was in the station he had a quarrel with the station agent, cursing him and threatening him (Rec. 163, 172-174). Old stayed in the station until the train commenced to move or about that time (Rec. 172, 174).

Eames, the conductor, testified that he walked south toward the caboose; that the south end of the platform is seventy or eighty feet south of the door of the station; that when he had gone thirty or forty feet south of the station door he stopped for a moment, and at that time Old passed him. Old was also going south (Rec. 52). The train was in motion when Old passed Eames on the platform (Rec. 67). The train steadily increased its speed, and should attain full headway after it had run a quarter or half a mile, depending on how the engineer worked the engine (Rec. 56-57, 69). Eames continued on to the south end of the platform and waited there, and got on the caboose as it was passing. Eames does not know what became of Old after Old passed him going south (Rec. 55); but testified that, shortly after Old passed him, he saw a man with a lantern, sixty or eighty feet south of him, on the side of a car, and that, as he was stooping down and watching under the cars as the train went by, to see whether everything was all right, he glanced up and saw the man with a lantern on an S. F. R. D. refrigerator car, which he judged was the thirteenth, fourteenth or fifteenth car from the caboose (Rec. 53, 62-63, 215). There were two of these refrigerator cars together, and immediately in front of the refrigerator cars was an oil or acid tank; and the man with the lantern was near the north end of the second car behind the tank car (Rec. 56).

A list showing the numbers and initials of the cars in the

order in which they stood in the train was introduced in evidence. It shows that S. F. R. D. car 6239 was the sixteenth car from the caboose, and National Zinc car 17 was the seventeenth car from the caboose (Rec. 185, 216).

Eames could not tell whether the man with the lantern was Old, as he could not see his face (Rec. 54). Eames could not tell whether this man was walking or standing still, nor which way he was facing (Rec. 55-56, 61, 215). He did not watch this man and does not know what became of him. (Rec. 56). Eames waited until the caboose reached him, and got on it, giving another proceed signal just before getting on, (Rec. 66).

Rear brakeman Monroe stayed by the caboose at Page, and got on top of the caboose as the train started, and stayed there until the caboose was opposite to the station, when he went down into the caboose. He saw the signals given for the train to pull out of Page, but could not say positively who gave them, as he was twelve or fourteen car lengths away. The first signal was a highball given from the platform. A second signal was given after the conductor got on the caboose. It was given by some one on the top of a high car estimated by Monroe to be twelve or fourteen cars ahead of the caboose. The man who gave the signal from the top of the high car had just got up there. That was the first appearance of his light. The light was moving, but witness could not tell which way it was moving, and he did not know whose light it was (Rec., 69, 211-213). Monroe further testified that the light was still there when he went into the caboose (Rec., 74, 211-212); and that the person holding the light was apparently standing still. The light was on a part of the train on which Old ought to have been; that is, his duty was to look after the middle and rear portions of the train (Rec., 213-214). Monroe could not tell from the light whether the signal was given by the middle brakeman or the head brakeman (Rec., 74).

Engineer Clayton testified that the signals upon which he left

Page were a highball or proceed signal from two lanterns on the platform of the depot, and, after the train started, another signal from the rear of the train or about the caboose. He testified that he received no signal from and he saw no lantern on the top of the train near the middle of the train as it moved out of Page (Rec., 218).

Head brakeman Smith testified that he saw no signals given from the middle nor toward the rear of the train (Rec., 226). The station agent testified that he saw a light three or four cars ahead of the caboose, as the rear of the train was passing the station (Rec., 167, 174).

As the train was moving out from Page, and when about the fifth car ahead of the caboose was passing the station, a rock was thrown from the direction of the train, through the bay-window of the station, striking on a table and rebounding so that, if the rock had bounced straight, it would have hit the agent if he had been sitting in his usual place at the table. The rock struck the window about five feet from the ground (Rec., 157, 162-164, 170, 174-175). Apparently the rock hit the window "in a sloping way"; in other words, its direction was downward, and it was coming from a point squarely in front of the window (Rec., 167). The agent was not in the room at the time when the rock was thrown, but when it was thrown, his brother, who was standing near the window, called to the agent, and the agent immediately went in and looked out the window, and saw a light which appeared to be on top of a car three or four car lengths, or perhaps further, ahead of the caboose (Rec., 167, 174). Witness Holt stated that the agent had told him the rock was thrown from the caboose, and had said, also, that a brakeman threw the rock, and that he had had a quarrel with the brakeman (Rec. 337). No one except Old had had a quarrel with the agent, or made threats against him that night (Rec., 171, 175). The rock was a chert rock of the kind that is used for ballast on the railroad track at Page (Rec., 165). The same kind of rock could be found by

walking down as far as the south end of the platform. It was all along the track there (Rec., 174).

Shortly after the train left Page, Old was discovered fatally injured at a point about 95 yards north of the door of the station (Rec., 83). Old's body was lying between the rails of the track with his feet toward the north and his head toward the station; that is, toward the south. His left shoulder and left hand were crushed and both legs were cut off between the knees and ankles. A lantern was lying near the center of the track between the rails, about 16 or 18 feet south of where Old was found. The globe of the lantern was broken and was lying near the lantern. Beginning about 7 or 8, or 15 or 20 feet north of the lantern, and continuing to the place where Old was found, some blood and pieces of bone were found (Rec., 82-84, 93-95, 154, 193). The blood was on the east rail of the track, and the pieces of bone were close to the east rail and on the inside of the rail (Rec., 82-84, 96). No signs of the body being dragged were found; the track was a rock ballasted track (Rec., 82-84). Old's body was lying about 12 or 13 feet from the point where the first blood was found on the rail (Rec., 89).

S. F. R. D. refrigerator car No. 6239 and National Zinc car No. 17, and the other cars back to the caboose, were examined particularly, upon the arrival of the train at Heavener, and no blood was found upon the wheels of the cars (Rec., 185-186, 192, 210-211). Heavener is 17 or 18 miles from Page, and the blood might be obliterated in going that distance (Rec., 192).

Old was carried to the station and lived about an hour and 40 minutes to 2 hours after he was found (Rec., 86, 93). Old was apparently rational until about 30 minutes before he died; at least, from that time on he did not say anything (Rec. 86, 93, 159-160).

About an hour after Old was carried to the station, witness Holt asked Old how the accident occurred. Old was very weak but finally said that he went to catch the train and slipped. Wit-

ness then asked him if he went to catch the train or the caboose, and Old said the train. He also correctly stated the name of the conductor of the train—Harry Eames. These statements were the last statements with any sense to them which witness remembers Old to have made (Rec., 179). When witness found Old, the latter, in reply to questions, had given his name and the residence of his relatives. Witness Tucker and the two Blakeleys also heard the same statements by Old as to the way in which the accident occurred (Rec., 155-156, 159, 176, 178-179, 181-182). One witness, Tucker, testified that some one afterward asked Old whether he threw the rock through the window, and Old denied it (Rec., 156, 176).

The testimony regarding Old's admissions as to the manner in which the accident occurred was admitted without objection; but plaintiff afterward moved that the testimony be excluded, for the reason that it was inadmissible as against the beneficiaries, and the court, over defendant's objection and exception, then ordered the testimony excluded (Rec., 184).

There was evidence tending to show that Old had been drinking and a small bottle of whiskey about two-thirds full was found in his pocket (Rec., 155, 157-158, 160-161, 163, 175, 178-181, 339).

There was also testimony tending to show that he had not been drinking, or negative testimony on the subject (Rec., 220, 222-223, 332-336, 338, 340-341).

Old's Place of Duty on Leaving Page.

Conductor Eames testified that, assuming that the man whom he saw on top of the car was Old, the duty of the latter was to work north toward the head end of the train and that, in moving north, Old would have passed over the tank car just ahead of the two refrigerator cars if he had gone far enough (Rec., 56-57, 61). Eames estimated the distance, from the point on the refrigerator car where he saw the man with the lantern, to the tank car, at

48 to 50 feet (Rec., 56). Eames testified that there was no particular place on the train where Old should have gotten on, but, on that particular train, Old had no duty to perform on the cars to the rear of the car on which he saw the man with the lantern; that, if Old had gotten on further back toward the caboose, he would have had to turn and go toward the head end (Rec., 61-62). It is the duty of the brakemen, in descending heavy grades, to turn up the retainers in order to retain the braking pressure in the cylinders of the air brakes, and thereby assist the engineer in letting the train down the grade. Leaving Page, there is an upgrade for a distance of about two miles (Rec., 58-59). Old would have been required to begin working the retainers two miles north of Page; that is, the down grade commenced about that distance north of Page (Rec., 58-59). The head brakeman takes care of the head end of the train, and the swing or middle brakeman comes next. The requirement is that 75% or 85% of the retainers must be turned up. The head brakeman drops back and gets his third, and the swing brakeman gets the remainder that are necessary to make up the proper percentage of retainers turned up on the total train (Rec., 61-62). The rear brakeman was acting as flagman, and under those circumstances the head and swing brakeman look after the entire train with reference to the retainers. The retainers are turned up on enough loaded cars to make the required percentage of retainers, and the cars to the rear of the car on which Eames saw the man with the lantern were empty cars (Rec., 61-62).

The rear brakeman, however, testified that Old's place of work was between the caboose and engine; that the head brakeman's place of duty was on the head end, and to work back toward the rear end of the train, and Old's duty was to begin at the caboose, and to work to where he met the head brakeman or where the head brakeman left off (Rec., 68). The position of the swing or middle brakeman depends greatly on the location of the cars in the train. In order to get 85% of brakes, the brakemen might pos-

sibly use empties. They use loaded cars as a general rule where they can get 85% (Rec., 214).

Testimony Regarding Alleged Jerking and Jolting of the Train as it Left Page.

Witness Holt, a merchant, testified that he was walking along a road which ran parallel to the railroad track; and was some distance north of the station, and about 25 or 30 steps west of the train, when he noticed that the train seemed to grind several times, but there were two large jerks; that he could not recall a jerk as heavy as that was. He looked to see if he could locate the cause of the jerking and found Old. He testified that he thought the train was off the track and watched the train to see how far it would go before they discovered that something was wrong with the train (Rec., 85). There was some timber and small buildings between Holt and the railroad track (Rec., 89).

Witness Buschow testified that he had retired to bed, and his attention was called to the fact that the train pulled out with an unusual amount of hard jerking. It pulled out for the full length of the train. His room was 80 or 85 feet from the track. A minute and a half or two minutes later, after the train had passed out of hearing, he heard cries for help and went over to where Old was (Rec., 92-93).

Witness Maggard testified that his railroad experience had consisted in engine waiting; that he lived about 100 yards from the train, and had retired, on the night of the accident, and the doors and windows were closed; that he did not know how many and how hard the jerks were; that he just noticed the jerking and it was a little bit unusual; that the jerking was not harder than he had ever heard before; that the train was jerking like it had a stuck brake, or something like that; that he had heard them jerk that hard, but it was a little unusual or he wouldn't have noticed it. He thought that the train jerked four or five times (Rec., 97).

Witness Bailey testified that he was a saw filer and was riding

on the freight train, by the permission of Old, without paying any fare. Bailey testified he was on a lumber car, and he thought there was a tank car two or three cars back, but he was not positive; that after the train started, it took a jerking spell and seemed to check up and then start, and made him slip on the lumber when it jerked, perhaps the distance of a foot. He testified that just as the train jerked the last time, he heard somebody cry out, "Oh, oh." He could not tell from what direction it came, but it seemed to be tolerably close (Rec., 98-102).

All the trainmen testified that there was no unusual jerking or jolting of the train as it left Page (Rec., 211, 216, 219, 225, 227).

Testimony Regarding Cause of Alleged Jerking or Jolting of the Train.

There was no trouble with the air after the train reached Page (the accident occurred as the train was leaving Page). The air had stuck on one car once or twice before reaching Page (Rec., 50-51). The only trouble with the air that day was that a brake was sticking. Some brakes will not release as quickly as others. The effect of a brake sticking is to drag heavy on the train. It does not create a jerking or lurching. This trouble only occurred once as the train was reaching Mena (Mena is south of Page, so this trouble occurred before Page was reached). This sticking is caused by different things. If a train is cut in two, as at a road crossing, the air will leak out and cause the piston to come out (Rec., 70-72). One witness testified that the train was jerking like it had a stuck brake (Rec., 97). There was no trouble with the air in moving out of Page (Rec., 212, 216, 218-219, 225, 227). The engineer (Rec., 218-219) described the manner of departing from Page as follows:

Page is a place where, when going north, it is a little down-hill, and we had a long train and a large engine, which requires extra precaution in starting the train to avoid bump-

ing the draw-bars. In order to start the train without bumping the cars, we have to start slow, and take out the slack gradually, but the engine at the time had a small amount of steam in the cylinders, and I just released the independent air brake on the engine, and the weight of the engine, together with the small amount of steam in the cylinders, was sufficient to start the head end of the train, and there was no steam used to pull the train, as the weight of the engine starting, and the descending grade caused the whole thing to start without using steam.

The engineer further testified that when he began to use the steam, he opened the throttle very lightly at first, taking the slack out of the cars gradually. It requires considerable time to start one of those trains with a Mallet type locomotive. The train had gone between a quarter and a half a mile before the engineer began using steam. Up to that point (that is, while the train was traveling the one quarter or half a mile), there were no unusual or violent jerks of the engine or train, nor were there when the engineer began applying the steam. There was no defect in the brake appliances as the train was pulling out of Page.

Over defendant's objection the engineer was asked what usually causes a severe jerking and lurching of a train, and he answered:

I couldn't answer that question. I would have to know what conditions.

Plaintiff then asked:

Now, then, assuming the train did lurch and jerk unusually that night as it was going out of Page, what, in your opinion, would have caused it?

Defendant renewed its objection, which was overruled, and the engineer answered:

It could have only been caused by the engineer in charge using too much steam and starting the head end of the train too quickly.

He further testified that this did not occur, and there was no jolting of the train at that point (Rec., 218-222). There had been in the train a car known as a "dynamiter," but it was set out at Howard (before reaching Page) (Rec., 220-221, 227-228).

Testimony Regarding S. F. R. D. Car 6239 and National Zinc Car 17, the Two Cars Which Plaintiff Contended Were Insufficiently Equipped With End Ladders and Handholds.

Plaintiff contended that Old was passing from S. F. R. D., or refrigerator car No. 6239, to National Zinc Company, or tank car 17, when he fell and was injured. Both these cars were foreign cars belonging to other companies than the defendant (Rec., 186). None of the appliances with which the cars were customarily supplied were defective or missing (Rec., 78, 186, 339, 233, 236-237). The cars complied with the rules of the Interstate Commerce Commission and of the Master Car Builders' Association, and under the rules and regulations of the railroads throughout the country, must be received in interchange (Rec., 187, 195, 205-206, 232-233, 237, 240). The refrigerator car had side ladders and also two handholds on the end of the car, one on each corner (Rec., 191). The National Zinc car was a tank car consisting of a wooden frame or platform which was about 32 feet long, and about as wide as a box car, 8 feet or 8 feet 8 inches wide (Rec., 131-132). A tank about $5\frac{1}{2}$ feet in diameter and 24 feet long, was placed on the platform. There was, therefore, a space of between 3 and 4 feet between each end of the tank and the end of the car, and there was sufficient space between the tank and the side of the platform of the car for a walk-way from one end of the car to the other (Rec., 132). Along the outer edge of each side of the platform there was a hand railing which came to within 14 to 24 inches of each end of the car (Rec., 79-81, 115, 186, 203, 198-199). The tank car was also equipped with handholds on each end sill and one handhold on each side sill at each end of the car (Rec., 132-133, 198-199). Tank cars are of various

styles of construction. On some tank cars the tank is so large that the walk-way must be placed above the tank, or near the top of the tank, as there is not room for it elsewhere, and a ladder is then constructed reaching up to the walk-way. On a National Zinc tank car there is plenty of room for a walk-way on either side of the tank on the floor of the car (Rec., 131-132, 110-111).

There is no railing across the end of the car as it would be in the way of the brakeman in getting onto the walk-way (Rec., 131-132). Tank cars which do not have end ladders have a railing around the platform (Rec., 139). A low car loaded with lumber or some other commodity difficult to get hold of is more dangerous than an oil car (Rec., 143). It is not possible to put end ladders on a National Zinc tank car because the latter is just like a flat car (Rec., 204).

A brakeman in passing from the refrigerator car to the tank car would come down the side ladder of the refrigerator car, and stepping on the lowest handhold on the side of the refrigerator car, or on the handhold on the end of the car, with one foot, and holding to one of the side handholds with one hand, would place his other foot on the platform of the tank car and take hold of the hand railing of the tank car with his other hand (Rec., 79, 196, 234).

Plaintiff's witness Sweeney testified that it would be safer for a man to get from a high car to a low car if it was equipped with an end ladder, or an end grab iron or handhold, that a man could hold to in passing from one car to the other. Being asked whether a brakeman would necessarily have to turn loose his hold on the side handhold of a box car before he could get over to a low car, Sweeney replied that it would depend on what size man he was; that a man like himself would have to turn his handhold loose on the box car before he could get over on the low car (Rec., 105).

Plaintiff's witness Hobson, being asked whether, assuming that a refrigerator car had only one end grab iron, which was within 18 inches of the floor of the car, the car being also equipped

with a side ladder on the end, and assuming that a tank car immediately in front was equipped with side railings, and those side railings came within 14 inches of the end of the car, a brakeman could step from the side ladder of the refrigerator car over onto the floor of the tank car and secure a handhold on the side railing of the tank car without turning loose his handhold on the refrigerator car. Hobson answered that he might do it; but he thought it would be dangerous; that there were men who did such things but he wouldn't do it (Rec., 114-115). Hobson was unable to describe the construction of the various tank cars, and stated that he did not know what kind of hand railings or walkways the National Zinc Company car has (Rec., 120-121). He testified that not all of the refrigerator cars have side and end ladders, but that the new refrigerator cars which are now being brought out are so equipped (Rec., 129).

Numerous witnesses made actual tests on an S. F. R. D. car and National Zinc tank car which were of the same style and construction as the S. F. R. D. car and National Zinc car involved in this case. The two cars were coupled together, leaving the maximum amount of space between the ends of the cars (Rec., 200), and the witnesses testified that they could make the passage from the refrigerator car to the tank car, grasping the railing on the tank car without letting go of the handhold on the refrigerator car (Rec., 196, 199, 200, 206-207, 230, 234, 237-239, 331-332). One of the men who made the test was five feet four inches in height, and another man, five feet five and one-half inches in height (Rec., 207, 234). Old was a large, strong, active man six feet in height (Rec., 72, 144-147). The distance from the handhold on the refrigerator car to the railing on the tank car was estimated at from 40 or 45, to 58 inches, the latter being an actual measurement taken on the cars on which the test was made (Rec., 80, 200). The distance from the end of the refrigerator car to the end of the platform of the tank car was 80 inches (Rec., 200); (in other words, a brakeman passing from the refrigerator car to the tank car

would have to step a little more than 30 inches and would have to reach 45 to 58 inches). There was a conflict of testimony on the question whether an end ladder on the refrigerator car would have afforded a safer passage than the side ladder, it being contended on the one hand that the distance the brakeman would have to step with his foot and reach with his hand would be less with an end ladder than a side ladder, and that the brakeman would have a more secure footing on the end ladder, as his foot would press against the end of the car; and it being contended, on the other hand, that the brakeman's foot would not be any more secure and the distance would not be more than four inches less, and perhaps not any less. It was also contended that a brakeman would be in an awkward position in passing from an end ladder on a refrigerator car to a National Zinc tank car, as his back would be toward the tank car in coming down the end ladder, and he would have to turn partly around to pass from the end ladder to the platform of the tank car (Rec., 105, 109, 114, 122-128, 134-136, 139-140, 196, 199, 200-203, 207-208, 231, 235-236, 238-240).

It was undisputed that if a brakeman fell while using a side ladder, he would be much more apt to fall outside of and clear of the track than if he were using an end ladder, as, if he were using an end ladder, he would be directly between the cars and over the track, and, if he fell, he would fall under the wheels (Rec., 128, 136, 143, 201, 207, 235).

The testimony was to the effect that cars equipped like S. F. R. D. car 6239 and National Zinc car No. 17 are used by a majority of railroads and received in interchange (Rec., 187). Witnesses testified variously that a majority of the refrigerator cars have only side ladders (Rec., 188-189); that at least 50% of ordinary box cars are equipped with end ladders, and 75% of the refrigerator cars are so equipped (Rec., 104); that about 60% or possibly more of the refrigerator cars have end ladders (Rec., 139); that not more than half of the box cars are equipped with end ladders (Rec., 108). Box cars and refrigerator cars are on

the same order; they are called house or box cars (Rec., 183). The testimony was to the effect that on the southwestern and western railroads the majority of the cars have the ladders on the sides of the cars (Rec., 185); that a few railroads in the east place the ladders on the ends of the cars; but that 75% or 80% of the western railroads place them on the sides of the cars, the reason for this difference being that in the eastern country the railroads do not have as much room (in the way of right of way) as they have in the west; that on account of being crowded for room, the eastern railroads put the ladders on the ends of the cars so the men won't be raked off the sides of the cars in going into close quarters; while in the west, the ladders are put on the sides of the cars because that is the better and safer location for the ladders; that in case a man falls from an end ladder, he is in a more dangerous position than if he falls from a side ladder (Rec., 207).

The Interstate Commerce Commission has provided that by July 1, 1916, box and refrigerator cars shall be equipped with both end and side ladders, but does not require cars which were in service July 1, 1911, to be so equipped before July 1, 1916, unless, in the meantime, the cars are shopped for general repairs. S. F. R. D. car 6239 was in service on and prior to July 1, 1911, and has not since been shopped for general repairs, and this is also true of National Zinc car 17 (Rec., 194-200). S. F. R. D. cars which were in service on or before July 1, 1911, and have not been shopped for general repairs have only side ladders. The S. F. R. D. cars are now being equipped both with side and end ladders, and about 20% have been so equipped (Rec., 197).

Length of Time Necessary for Brakeman to Become Experienced.

Plaintiff's witness Lee testified that it would take a year or eighteen months, possibly two years, for a man of ordinary intelligence to acquire sufficient experience to become thoroughly familiar with the dangers incident to the work of a brakeman. Of course, there are exceptions (Rec., 111). Another witness fixed

the time at three to five years (Rec., 140). Plaintiff's witness Hobson testified that it would take a man of ordinary intelligence from eighteen months to three years; that he could not become familiar with the dangers in five or six or eight months. He admitted, however, that the danger of passing between cars was obvious to any man of ordinary sense (Rec., 124-125).

Interstate Commerce Regulations Regarding Handholds and Other Safety Appliances.

The defendant offered in evidence the order of the Interstate Commerce Commission made March 18, 1911, extending the time for making changes in safety appliances to July 1, 1916; also that part of the Commission's orders, prescribing safety appliance standards, applying to cars constructed as the National Zinc Company's car 17 is, for the purpose of showing the number of handholds and grab irons required on such cars. The defendant then offered the entire orders of the Interstate Commerce Commission on the subject. The court, over defendant's objection and exception, excluded this evidence (Rec., 241).

Testimony on the Subject of Damages.

Old was between 24 and 25 years of age at the time of the accident. Old's widow was between 23 and 24 years of age, and his one child was five weeks old (Rec., 147-150). At the age of 25, the life expectancy, according to the tables, would be 38.81 years, and at the age of 24, 39.49 years. Old earned sixty-five to seventy-five dollars per month, after the deduction by the Railway Company of the sum due for his meal books; and Old's personal expenses for clothing, shoes, and things of that kind, amounted to \$10.00 per month (Rec., 148-151).

The Judgment.

The complaint was brought upon the theory that the Federal Employers' Liability Act contemplated two causes of action, to-wit, one for compensatory damages, and one for the pain and

suffering endured by decedent between the time of his injury and death. These two causes of action are sued for in the same complaint. The plaintiff placed the damages for pain and suffering at \$10,000, and the compensatory damages at \$15,000. The jury returned a verdict for the full sum of \$25,000, thus allowing \$10,000 for pain and suffering, and \$15,000 for compensatory damages. The trial court caused a remittitur of \$7,000 to be entered, leaving the judgment at \$18,000.

Questions Presented for Review.

The questions presented for consideration by this court may be briefly stated as follows:

(a) There is no substantial evidence in the record of any negligence on the part of the defendant, under the Employers' Liability Act, as properly construed, which warranted or authorized the lower court in submitting the case to a jury. This question was preserved by the defendant's request for a peremptory instruction to find the issue for the defendant (Rec., 345).

(b) The lower court erroneously construed the Employers' Liability Act, as amended by the Act of April 5, 1910, to create in the plaintiff two causes of action; one under section 1 of the act for the death of his intestate, and the other for pain and suffering under section 9 of the act; and permitted a recovery upon this erroneous interpretation. It is our contention that under the act as properly construed, but one cause of action could arise to plaintiff, if otherwise entitled to recover, and that for the pecuniary injury only suffered by the beneficiaries. This question was presented by the defendant in its request for instructions in its own behalf presenting its interpretation of the act (Rec., 345, 370-371, 372) and by its objection and exception to the instruction on the same subject given at the instance of the plaintiff (Rec., 344, 374).

(c) Instruction No. 10 given by the lower court, upon the motion of the plaintiff, on the measure of damages under the Fed-

eral Employers' Liability Act as amended by the Act of April 5, 1910, involved an erroneous interpretation of said act in several particulars which are enumerated in the specification of errors. This question was presented by defendant's requests for instructions (Rec., 345, 370-371, 372) and its objection and exception to instruction No. 10 (Rec., 344, 374).

(d) The court erred in refusing to admit in evidence (Rec., 241), at the instance of the defendant, the orders of the Interstate Commerce Commission with regard to handholds, ladders, and other safety appliances, promulgated in accordance with the Safety Appliance Act of April 14, 1910, as amended by "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911. The plaintiff, in his complaint (Rec., 22-27), charged the defendant with negligence in that a certain refrigerator car and tank car were not properly equipped with handholds and end ladders. The orders of the Commission, if admitted, would have disproved the charge of negligence in this respect.

(e) The lower court erred in denying the petition of the defendant (Rec., 28-33) for the removal of the case to the Federal Court, on the admitted ground of diversity of citizenship, the plaintiff being a citizen of Arkansas, and the defendant being a citizen of Missouri.

SPECIFICATION OF ERRORS.

The assignments of error are numerous, but they present a comparatively few fundamental federal questions which we hereby enumerate and specify as the errors relied upon:

1. There was no substantial or sufficient evidence to support a verdict for the plaintiff, under the Employers' Liability Act as amended, and the Supreme Court of Arkansas should have so found, and should have reversed the judgment, rendered in the lower court in favor of the plaintiff, instead of affirming it.

2. The Supreme Court of Arkansas erred in holding that under the Federal Employers' Liability Act, as amended, the plaintiff was not only entitled to recover damages by way of compensation for the financial loss to the widow and child of deceased, but that he "could also recover for the conscious pain and suffering which the husband and father endured after the injury, which survived to appellee as the personal representative of Old for the benefit of his widow and child."

3. Instruction No. 10, given by the lower court on motion of the plaintiff, upon the measure of damages under the Federal Employers' Liability Act as amended by the Act of April 5, 1910, and which was as follows (Rec., 374):

If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus

ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff

was erroneous in the following particulars:

(a) The instruction directed the jury to award damages both on account of the pain and suffering of the decedent, and of the pecuniary loss of the beneficiaries on account of the death of the decedent. (This point is covered by the second specification of errors).

(b) The instruction did not require the jury to state separately the amounts awarded respectively to the widow and child of the decedent, nor to state separately the amounts awarded under section 1 and section 9 of the act.

(c) The instruction did not limit the child's right of recovery to its pecuniary loss during the years of its minority, and the widow's right of recovery to her pecuniary loss, during her expectancy of life.

(d) The instruction did not require the jury to limit the damages to such an amount as one of decedent's character and disposition might be expected to contribute to his wife and child. The Supreme Court of Arkansas erred in upholding the instruction as against the above objections.

4. The Supreme Court of Arkansas erred in holding that the orders of the Interstate Commerce Commission, with respect to safety appliances, were properly excluded from evidence by the lower court, and in approving the action of the lower court in that behalf.

5. The Supreme Court of Arkansas erred in holding that the defendant was not entitled to remove the case to the Federal Court, and in approving the action of the lower court in denying the defendant's petition for removal.

BRIEF.

I.

There was no substantial or sufficient evidence to support a verdict for the plaintiff under the Employers' Liability Act as amended, and the Supreme Court of Arkansas should have so found, and should have reversed the judgment rendered in the lower court in favor of the plaintiff, instead of affirming it.

We think a reference to the plaintiff's allegations of negligence will be of assistance in determining the sufficiency of the evidence. In the amended complaint (Rec., 22-27), the right of recovery is based solely upon the allegation that the deceased came to his death by falling between a certain refrigerator car and tank car. It is alleged that, as Old was passing from the refrigerator car to the tank car, the top of the refrigerator car being 6 or 7 feet above the floor of the tank car, there was an unusual and violent movement of the train; and that, by reason of such unusual and violent movement of the train, concurring with the alleged negligence of defendant in failing to provide end handholds or ladders on the refrigerator car, and tank car, the deceased fell between the cars and was killed. No other theory as to the happening of the accident was advanced either in the trial court, or the Supreme Court of Arkansas. If any other theory as to the cause of the accident is advanced in this court by the plaintiff, it will, as we contend, be presented here for the first time.

Referring to the absence of ladders on the end of the refrigerator car, it is alleged in the complaint (Rec., 24):

That the absence of these grab irons or handholds or ladders down the end of the box or refrigerator car made it unnecessarily hazardous for the brakemen to pass from the top of said box or refrigerator car to said platform or walkway on the oil car immediately in front of it.

It is then alleged that there were no grab irons or handholds on the end of the refrigerator car; and that, as the train was ordered to leave Page, Old got on top of the train on the front end

of the second car in the rear of the oil or tank car, and proceeded thence toward the front end of his section of the train "which carried him over the refrigerator car immediately in the rear of the oil car." Then follows this allegation (Rec., 24):

That when said train began to move out of the station of Page, because of the defective condition of the air, as aforesaid, or from the negligence of the engineer in manipulating the air of said train, or from some other reason unknown to plaintiff, said train began jerking and swaying violently and unusually, and so continued until plaintiff was injured.

That in attempting to pass from the top of the box or refrigerator car onto the oil car immediately in front thereof in the discharge of his duty as such brakeman, and when said train was jerking violently, as aforesaid, and because of the absence of ladders or handholds or grab irons down the end of said box or refrigerator car which would have enabled the deceased to hold and thereby safely pass from the top of said box or refrigerator car onto the oil car, the said deceased was either thrown from said car or fell between the ends of the box car or refrigerator car and the oil car immediately in front thereof, and because of the absence of any ladder, handholds, or railing on the end of said oil car or tank car which would have enabled deceased to hold to while making such passage, said deceased was run over by defendant's said train"

and was thereby killed.

In specifying the particular acts of negligence which are claimed to have caused the death of the deceased it does not appear that the plaintiff relied upon the alleged violent movement of the train (Rec., 25-26). On page 26 there again appears in the complaint an allegation that the engineer of the defendant was negligent "in permitting his air to become out of order, or in carelessly manipulating his air, in such a manner that said train was caused to jerk violently and unusually, which jerking contributed to the injury of plaintiff's deceased as aforesaid." The alleged violent jerking thus referred to is clearly shown to be the jerking previously referred to, and it is nowhere alleged that this jerking

caused deceased to fall from any part of the train *except between the refrigerator car and the tank car as above set forth*. The complaint does not contain any allegation that the violent jerkings of the train were in any manner due to the negligent use of steam by the engineer, or to the negligent starting of the train by the use of steam. The absence of such an allegation is of importance in considering the evidence.

Following the above allegation of negligence on the part of the engineer, in handling the air, the complaint (Rec., 26) continues:

That had the defendant equipped its cars with handholds or ladders on the ends thereof, or had it placed in the make-up of said train a car so equipped next to the oil car, or had it placed in the make-up of said train any car nearly on a level with the platform of the oil car, plaintiff could and would have gone on to the said oil or tank car with safety. But, by reason of the absence of such handholds or ladders on the end of said box car, or other proper appliances which would have enabled deceased to safely go from the top of said box car to the platform of said oil car, *concurring with the unusual and violent jerking of defendant's train* as it passed out of the station of Page, the deceased was unable to safely go from the top of said car to the platform of said oil car while in the discharge of his duty, and in his effort to do so, and while in the exercise of due care himself, he was thrown between the ends of said cars and was injured, as hereinbefore stated.

These quotations from the complaint make it absolutely certain that the plaintiff based his right of recovery solely upon the allegation that the deceased fell or was thrown between the refrigerator car and tank car; and that the cause of his being thrown or falling was the absence of handholds, and the unusual jerking of the train *concurring therewith*. There can be no dispute on that point in this case.

The Supreme Court of Arkansas (Rec., 412) said:

Applying these principles to the facts in hand we are of the opinion that the jury were warranted in finding that

the death of Old resulted through the negligence of appellant in causing the violent jerking of the train, which, concurring with its negligence, also, in not equipping its cars with necessary ladders, grab irons, or handholds, on the end thereof, in order to enable Old to pass from the S. F. R. D. car to the tank car, caused him to fall between said cars and produced his death.

By reason of the above quoted allegations in the complaint, and by reason of the fact that the other parts of the record conclusively show that the case was tried in the lower court upon that theory alone, and decided upon the same theory by the Supreme Court of Arkansas, the plaintiff cannot now be heard to say for the first time that the case may be affirmed upon some other theory. *Thomas v. Taylor*, 224 U. S., 73.

We now pass to a discussion of the evidence, and respectfully submit that the case must be reversed because of a total failure of the evidence to show that the death of the deceased was due to any negligent act of the defendant.

(a) There was no proof that Old was injured as alleged by plaintiff, and the manner in which the accident happened is entirely a matter of conjecture.

There was no eye witness to the accident. The last time that Old is known to have been seen, before the accident, was when conductor Eames saw him walking south on the station platform (Rec., 52). Plaintiff sought to supply the lack of direct evidence as to where and how Old was injured by endeavoring to prove (a) that it was Old's duty when he got on the train, as it was leaving Page, to turn up the retainer valves on the loaded cars in the middle section of the train, in order to assist the engineer in holding the train by means of the air brakes, when the train started on a down grade about two miles north of Page; (b) that the refrigerator car on which Eames saw a man with a lantern (Rec., 53) and also the refrigerator car and tank car next in front of it, were empty, and Old would therefore, on

getting on the train, immediately start north over these cars, in order to reach the loaded cars, and begin turning up the retainers. It was apparently assumed that the jury could presume; (1) that Old was the man with the lantern who was seen on the train by Emes; (2) that Old did immediately start forward toward the head end of the train; (3) that he was passing between the refrigerator car and tank car at the time of the accident; and (d) was injured while attempting to pass from the refrigerator car to the tank car by a violent jerking of the train, concurring with the failure to provide sufficient handholds and other safety appliances on the refrigerator car and tank car.

What was the evidence on the subject? Eames could not tell who the man was, whom he saw on top of the car; but, assuming, for the sake of argument, that it was Old, Eames did not see him walk in either direction, and could not see which way he was facing (Rec., 56). Eames did not watch this man and does not know what became of him (Rec., 60-61). The swing brakeman has no particular place at which to begin his work (Rec., 61). Old would have had to begin to work the retainers two miles north of Page (Rec., 58). We infer from the evidence that he could have begun sooner, but that it was not necessary for him to do so.

Eames testified that Old should have worked forward in order to turn up the retainers; that there was nothing to require him to go toward the rear of the train, as the brakemen turned up the retainers only on loaded cars, and the cars to the rear of the refrigerator car on which the man with the lantern was standing were empty (Rec., 62). Eames said further, however, that 75% or 85% of the retainers must be turned up (Rec., 62). The rear brakeman, Monroe, testified that Old's duty was to work from the caboose to where he met the head brakeman, or where the head brakeman left off (Rec., 68). Monroe further testified that, in order to get 85% air brakes, the brakemen might possibly use empties, but as a general rule they use loaded cars *where they*

can get 85% (Rec., 214). The list of the cars which were in the train (Rec., 216) shows 52 cars exclusive of the caboose. Eighty-five per cent of these cars would be 44 cars; in other words, the retainers would have to be turned up on all but eight of the cars in the train, requiring Old to begin at the eighth car from the caboose. Seventy-five per cent would be 39 cars, requiring Old to begin at the thirteenth car from the caboose, instead of the eighteenth car, the latter being the car with which he would begin according to plaintiff's theory.

Assuming, however, for the sake of argument, that Old was the man whom Eames saw on the car, and that Old's duty required him to work north from that car, the fact still remains that it is entirely a matter of conjecture whether or not Old started forward immediately on getting on the train, since it was not necessary that the retainers be turned up until the downgrade two miles north of Page was reached; whether he went forward at such a rate of speed as to reach the point between the refrigerator car and tank car at the time of his injury, and whether the injury was due to the causes alleged by plaintiff.

There is, we submit, a much more reasonable explanation, under the evidence, of the manner in which the accident happened. It is undisputed that there was a quarrel between Old and the station agent. As Old left the station, he made threats against the station agent and was in a very angry mood, (Rec., 163, 172-174). According to Eames' testimony, Old must have gone about eighty feet south of the southern end of the gravel platform; that is, about 160 feet south of the door of the station. (Rec., 52, 63). According to plaintiff's theory, Old had no duty to perform that far south on the train, as there were no loaded cars south of the eighteenth car from the caboose, (Rec., 216). Eames testified that Old got on about the fourteenth or fifteenth car from the caboose. Why did Old pass by the eighteenth car and get on the fourteenth or fifteenth car, when the eighteenth car was the last loaded car in the train, the rear portion of the

train being composed of empties? Why did he walk eighty feet south of the platform? It is unreasonable to say that he went eighty feet south of the platform, and upon the rough ground, for the purpose of getting on the train, when, according to plaintiff's theory, it would be necessary for him immediately to start north over the empty cars in order to reach the first loaded car. Mounting the train from that point would be more difficult and dangerous. No possible explanation under the evidence, can be given of Old's action in going 80 feet south of the platform except that his motive was to secure a stone to throw at the station agent. There is nothing in the record to suggest that any other person than Old threw the stone, (Rec., 171, 175).

It is reasonable to assume, however, that Old went this distance south of the station platform in order to find a suitable stone to throw at the station agent. Old may have stood on top of a car while throwing the stone, or he may have stood on the station platform. In the latter event, he may, in order to avoid detection, or possible acts of retaliation by the station agent, have run some distance north of the station, and have slipped and fallen under the cars while attempting to get on the train. If Old was on the train when he threw the stone, he may have slipped, and, after holding to the couplers or some other part of the cars for a short time, have fallen under the wheels; or, after throwing the rock, Old may have attempted to get in between the ends of two cars in order to be out of danger from the station agent, and have slipped and fallen under the wheels. Other conjectures also might be made. It should be kept in mind that Old's body was found only a short distance—95 yards—north of the door of the station (Rec., 82-84), so that, whatever it was that happened, occurred while the train was running a comparatively short distance.

The testimony regarding the lights which were seen on the train between the head end and the caboose, also tends to show, so far as it shows anything, that Old did not go north over the

cars from the point at which Eames saw the man with the lantern. Eames testified that he saw a man with a lantern on top of the second refrigerator car south of the National Zinc tank car, but that he could not tell whether this man was walking or standing still, nor which way he was facing. He did not watch this man and does not know what became of him (Rec., 55-56, 61, 215). Rear brakeman Monroe testified that, as the conductor got on the caboose, a signal was given by some one on a high car, which he estimated at twelve or fourteen cars ahead of the caboose. He first stated that this light was moving, but he could not tell which way it was moving, but afterward stated that the person holding the light was apparently standing still (Rec., 213). He further stated that this light was still there when he went into the caboose; and that he could not tell, from the light, whether the signal was given by the middle brakeman, or the head brakeman (Rec., 69, 74, 211-214).

Monroe went into the caboose when the caboose was opposite the depot (Rec., 211). According to plaintiff's contention, Old was passing between the sixteenth and the seventeenth cars when he was injured. Figuring the length of the cars at only 35 feet each, which is considerably less than is justified under the testimony (Rec., 67, 213), the sixteenth car was 560 feet north of the caboose. Consequently, when the caboose was opposite the station, the sixteenth car was 560 feet north of the station. As Old's body was found 285 feet north of the door of the station, it is clear that the light which Monroe saw could not have been Old's light. Perhaps it was the light of the head brakeman, who was up near the engine.

Engineer Clayton testified that he received no signal from, and saw no lantern on top of the train near the middle of the train (Rec., 218). Head brakeman Smith testified that he saw no signals from the middle, nor toward the rear of the train (Rec., 226). When the station agent looked out of the window after the stone was thrown, he saw a light on top of a car three or four car lengths ahead of the caboose (Rec., 187, 174).

Furthermore, the position in which Old's body was found tends to show that the accident did not happen in the manner contended for by the plaintiff. It is undisputed that Old's body was found between the rails, and that only his legs had been run over by the wheels (Rec., 82-84). In making the passage from the side ladder of the refrigerator car to the tank car, Old necessarily would have had his body ten or twelve inches, and perhaps further, east of the side of the refrigerator car, that is, outside of and away from the rails, for in coming down a side ladder, the brakeman necessarily carries his body from ten to twelve inches away from the side of the car. If Old had fallen, in an effort to pass from the refrigerator car to the tank car, the undisputed testimony tends to show that his body would have fallen outside and clear of the rails, (Rec., 128, 136, 143, 201, 207, 235).

The Supreme Court of Arkansas, in its opinion (Rec., 412), says:

To get on the tank car from this ladder (on the refrigerator car) the brakeman would have to throw himself around the corner of the refrigerator car and step diagonally across on the platform of the tank car * * * He could only pass from the refrigerator car to the tank car by stepping around the corner of the refrigerator car diagonally toward the center of the tank car.

Under the evidence, the Supreme Court is clearly in error in the above statements. The width of the refrigerator car and tank car was practically the same; (Rec., 131, 198) the ladder was on the side of the refrigerator car, and the hand railing was on the outer edge of the side of the tank car; consequently, a brakeman, in order to pass from the one car to the other, would move in a direction practically parallel with the side of the refrigerator car and tank car not diagonally toward the center of the tank car, nor around the corner, in passing from the refrigerator car to the tank car.

The Supreme Court of Arkansas also says:

To make the passage he would have to release his hand-

hold on the refrigerator car in order to secure a handhold on the side railing of the tank car (Rec., 412).

It was necessary for a brakeman in passing from the side ladder on S. F. R. D. car to the tank car, while the train was in motion, to release his hold on the former before he was able to secure a handhold on the railing on the tank car. (Rec., 406).

We submit that there is no testimony in the record to support the above statements, and that they are contrary to the evidence in the case. Plaintiff's witness Sweeney stated that he could not reach from the side ladder to the hand railing; that it would depend on the size of the man, (Rec., 105). Plaintiff's witness Hobson testified that he might do it but he thought it was dangerous, (Rec., 114-115).

Numerous witnesses testified from an actual test made on an S. F. R. D. car and National Zinc car, that even men of as small stature as five feet four inches, and five feet five and one-half inches, could reach from the side handhold on the refrigerator car to the end of the hand railing on the tank car, and make the passage from the one car to the other, without letting go of the handhold on the refrigerator car, until they had taken hold of the hand railing on the tank car. Old was a large, active man, six feet tall, and could have made this reach much more easily than these witnesses. This test was made while the cars were standing still, but there was the maximum amount of space between the ends of the cars, (Rec., 196, 199, 200, 206-207, 230, 234, 237-239, 331-332).

We understand that the plaintiff's witness who made an actual test on the cars was able to grasp the railing on the tank car without releasing his hold on the ladder of the refrigerator car, just as defendant's witnesses were (Rec., 331-332).

The Supreme Court of Arkansas, in its opinion (Rec., 418), says further:

The fact that immediately after this last jerking of the train some one was heard to cry out, Oh! Oh! and that the

body of Old was soon thereafter discovered, tends to show a causal connection between the lurching of the train and his death.

The only witness who testified that he heard such cries, as we understand the testimony, was plaintiff's witness Bailey, who claimed to have been on the train. Bailey does not state that he heard these cries immediately after this last jerking. He states that he heard the cries just as the train jerked the last time (Rec., 99). He does not say that the jerking was violent or unusual. In fact, his statement "that it seemed like (the cars) kind of checked up and then started up, just kind of check and start" would seem to describe very well the motion of a freight train while getting under way on a down grade (Rec., 218), due to the slack running up. Moreover, before such evidence could have any force, plaintiff must prove that Old was on the train; was in a position where he would be affected by jolts and jerks, etc. There is nothing even to show on what part of the train Bailey was.

Nothing was found on the cars or elsewhere to indicate where Old was, with reference to the train, nor what he was doing, at the time that he fell and was run over (Rec., 192).

The Supreme Court of Arkansas cites as authority for its decision in this case, its opinions in the cases of *St. Louis, I. M. & S. R. Co. v. Hempfling*, 107 Ark., 476, 156 S. W., 171, and *St. Louis, I. M. & S. R. Co. v. Owens*, 108 Ark., 145 S. W., 879.

In the *Hempfling* case, *Hempfling* and a fellow brakeman both got on the twelfth car in the train. As stated in the opinion, the latter testified:

I started toward the caboose and he (*Hempfling*) started toward the engine and climbed over the car. I don't know whether I got over the next car or up on the first car. I heard something that attracted my attention like a lamp globe broke and I looked around and couldn't see him and felt the car run over something and went there and found his lamp globe and gave them a stop signal and stopped the train and I went back and found him dead. The lamp globe was broke and the lantern was up in the car that he was getting into.

In other words, the testimony of the witness, and the position of the lantern in the car, established the point at which Hempfling was at the time of his injury.

In the Owens case there was an impression in an embankment where Owen's side or hip had struck the embankment: Owen's hat band with his badge of brakeman was found near this impression, and thirty or forty feet north of the impression in the embankment was found the first evidence of his being run over. Blood was found on the track at that point. An examination of the train was made, and the first blood was found on the wheels of the rear truck on the twelfth car from the engine. It was also established that there was a hot box on the eighth car from the engine, and that it would be Owen's duty to go down on the side of the car in order to look after such a hot box.

In the case of *Choctaw O. & G. Ry. Co. v. McDade*, 191 U. S. 64, the court, in the statement of facts, says:

McDade was at his post of duty and when last seen was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which the train was then approaching. The train passed Goodwin at a rate from twenty to twenty-five miles an hour. At Goodwin, there was a water tank having attached thereto an iron spout which, when not in use, hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed from the train and upon search being instituted, his lantern was found near the place on the car where he was at the time of giving the signal. His body was found at a distance of about 675 feet beyond the Goodwin tank. There was also testimony tending to show from the location of the water spout and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the over-hanging spout. The car upon which McDade was engaged at the time of the injury was a furniture car, wider and higher than the average car, and of such size as to make it highly dangerous to be on top of it at the place it was necessary to be when giving signals, in view of the fact that the

spout cleared the car by less than the height of a man above the car when in position to perform the duties required of him.

In all of the above cases there were either witnesses, or marks and objects to show with practical certainty the point on the train at which the injured man was at the time of the accident. We submit that there is no such evidence in the present case. We wish to call the Court's attention especially to the Hempfling case, as the theory of the plaintiff in the case at bar is very similar to that in the Hempfling case.

In order to sustain plaintiff's theory, in the case at bar, it is necessary, in addition to presuming that the man whom Eames saw on the top of the car with the lantern was Old, also to presume that Old went forward over that car and the refrigerator car next ahead of it, climbed down the ladder on the side of the latter car, and was passing from the last named car to the tank car just at the time of an alleged violent jerking of the train, and that the injury was caused by such jerking, concurring with the lack of handholds and other safety appliances—assuming that negligence with regard to the alleged jerking of the train and lack of handholds and appliances was proved, which, as we shall later attempt to show, was not the case.

A plaintiff cannot make out a case by thus piling one presumption upon another. In *United States v. Ross*, 92 U. S., 281, the second syllabus is as follows:

Because officers are presumed to have done their duty, it is not the law that the Court can conclude that the property was delivered by the military officer to a treasury agent; that it was sold by him, and that the proceeds were covered into the treasury. The presumption that public officers have done their duty, does not supply proof of a substantive fact.

The Court says in its opinion:

It is obvious that this presumption could have been made only by piling inference upon inference and presumption upon

presumption * * * These seem to us to be nothing more than conjectures. They are not legitimate inferences even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed.

In *A. T. & S. F. Ry. Co. v. De Sedillo*, 219 Fed., 686, which case, in its general aspects, is quite similar to the present one, the Court, in holding that a verdict should have been directed in favor of the defendant, on account of failure of proof, said:

The requirement that the logical inference styled a presumption of fact should be a strong, natural and immediate one, brings as a corollary the rule that no inference can legitimately be based upon a fact the existence of which itself rests upon a prior inference. In other words, there can be, in the great majority of cases, no presumption upon a presumption. On the contrary, the fact used as the basis of the inference, the *terminus a quo*, so to speak, must be established in a clear manner, devoid of all uncertainty. *Chamberlayne's Modern Law of Evidence*, Sec. 1029, p. 1228; *United States v. Ross*, 92 U. S., 281, 23 L. Ed., 707; *United States v. Pugh*, 99 U. S., 265, 25 L. Ed., 322; *Manning v. Insurance Co.*, 100 U. S., 693, 25 L. Ed., 761; *Cunard S. S. Co. v. Kelley*, 126 Fed., 610, 61 C. C. A., 532; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa, 121, 96 N. W., 718; *Duncan v. Chicago, R. I. & Pacific R. Co.*, 82 Kan., 230, 108 Pac., 101.

As we have sought to show, the evidence furnishes fully as reasonable a conjecture that, instead of proceeding forward over the cars, for the purpose of turning up the retainers, as contended by plaintiff, Old was engaged in throwing a stone at the station agent, and in some manner was injured in that connection.

If there are two equally reasonable conjectures, plaintiff is not entitled to recover.

In *Patton v. Texas & Pacific R. Co.*, 179 U. S., 658, the Court said:

And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.

In *Midland Valley Railroad Co. v. Fulgham*, 181 Fed., 93, the Court said:

Nevertheless, counsel for the plaintiff insist that it was a permissible inference that they (the lever and coupler) were thus defective, which the jury might lawfully deduce from the fact that after jerking the lever Pogue stepped in between the cars and put, or sought to put, his hand upon the coupler. But this inference rests upon two conjectures, the conjecture that the reason for attempting to put his hand on the coupler was that it was closed and he desired to open it, and the further conjecture that he was unable to open it by the use of the lever. Moreover, these are not the only conjectures which the accident presents and suggests. We may as well conjecture that the coupler was open before Pogue moved the lever, and that he jerked it to test its operation and stepped in to examine the pin or some part of the coupler; that the coupler was closed when he approached it; that he drew the pin by his jerk of the lever and then stepped in to examine some part of the pin or coupler, and, in view of the fact that inspectors who examined the coupler shortly before the accident found no defect in it, and of the fact that employes who used it immediately afterward testified that it had no defect and operated perfectly, the conjecture that the cause of the deceased's entry between the cars was his curiosity and not the necessity to go between them to open the coupler is at least as rational as that the company failed to furnish or to maintain an operative coupler.

See, also, *Looney v. Metropolitan Street R. Co.*, 200 U. S., 480; *Coin v. Lounge Co.*, 222 Mo., 488; *Bolen-Darnall Coal Co. v. Hicks*, 190 Fed., 721; *Hamilton v. K. C. S. R. Co.*, 123 Mo. App., 619.

Old's admission, made after his injury, that, in attempting to catch the train, he slipped and was injured, also shows that Old was not injured in the manner contended for by the plaintiff. Testimony as to Old's admission was received without objection, and the Court afterward excluded it on the theory that this testimony was inadmissible as against the beneficiaries under the Federal Employers' Liability Act.

The Supreme Court of Arkansas (Rec., 414-415) holds that this testimony was properly stricken out because "the admissions of a deceased person against his interest are competent only when the action is for or against him in his own right." The Court apparently concedes that, as to the cause of action which plaintiff, erroneously as we contend, was permitted to prosecute under Section 9, the testimony would have been admissible, since that was a continuation of the suit which the employe himself would have had a right to bring if he had survived. The Court holds, however, that, as to the cause of action under Section 1, the testimony was not admissible against the beneficiaries, because, with respect to that cause of action, there was no privity of interest between Old and his wife and child.

As stated above, the testimony was admitted without objection, and we submit that, even under the Court's view of the matter, if the plaintiff had desired that the testimony be limited to the cause of action which he was prosecuting under Section 9, he should have asked the Court to so limit it, instead of asking that the testimony be stricken out.

We submit, however, that the evidence was properly admitted as to both causes of action, and should be considered by this Court.

In *Georgia Railroad & Banking Co. v. Fitzgerald*, 108 Ga., 507, 34 S. E., 316, the Supreme Court of Georgia, in holding that admissions, against interest, made by the deceased, were admissible against the widow, said:

An admission by a person tending to show that a physical injury received by him and which subsequently resulted in

his death, was caused by an accident and not by the negligence of the railroad company of which he was an employe, was admissible in evidence for the defendant on the trial of an action for the homicide of such person brought by his widow against that company.

We submit that the case should be reversed outright, for the reason that there is no legally sufficient proof as to the manner and cause of Old's death.

We shall now endeavor to show that plaintiff failed to prove that defendant was negligent.

(b) Plaintiff failed to prove that the alleged jerking of the train was due to defendant's negligence.

Before proceeding to a discussion of the evidence introduced to show negligence in this respect, we wish to call the Court's attention to the fact that the evidence regarding the alleged jerking of the train is unsatisfactory, and of little if any force. So far as the record discloses, only one of plaintiff's witnesses—Maggard—had had any experience in railroad operation, and he testified simply that the jerking of the train was a little unusual (Rec., 97). All the trainmen testified that there was no unusual jerking or jolting of the train as it left Page (Rec., 211, 216, 219, 225, 227). The Court judicially knows that there is necessarily considerable jerking and jolting of freight trains, especially a train of fifty-one cars. As testified by engineer Clayton, also, the track is down-grade for a short distance north of Page, (Rec., 218-219), and the cars would naturally run up against each other to some extent. The testimony of plaintiff's witness Bailey indicates that this is all that occurred, (Rec., 99).

The Supreme Court of Arkansas is, we submit, incorrect in its statement (Rec., 411) that;

It had been shown * * * that the train had moved out up grade more than 100 yards, tending to show that the slack had been taken out.

The testimony was that for two miles north of Page the general grade was up-grade, but no witness disputed Clayton's testimony that, for a short distance north of Page, it was down-grade. As the Court knows, it is not unusual that there should be a slight stretch of down-grade at points where the general grade is an up-grade.

The defendant objected to the admission of the testimony of witnesses not familiar with railroad operation, and we submit that such testimony was not competent and should be disregarded. Elliott on Evidence, Vol. 2, Sections 1034, 1038, 1039. Opportunity for observation alone is not sufficient to qualify a witness as an expert. Elliott on Evidence, Vol. 2, Section 1040.

If it should be held, however, that the testimony was sufficient to go to the jury on the question whether or not there was any violent and unusual jerking of the train, we submit that there was no proof that such jerking was due to the negligence of the defendant.

Plaintiff alleged in his complaint that the engineer or the defendant was negligent on the occasion of decedent's injury, in permitting the air brakes to become out of order, or in carelessly manipulating the air brakes, in such a manner that the train was caused to jerk violently and unusually (Rec., 26).

There was no proof that the air brake appliances were out of order, or that, if out of order, this condition was due to defendant's negligence, or that the engineer negligently manipulated the air brakes.

There was no trouble with the air after the train reached Page (the accident occurred as the train was leaving Page). The air had stuck on one car once or twice before reaching Page (Rec., 50-51). The only trouble with the air that day was that a brake was sticking. Some brakes will not release as quickly as others. The effect of a brake sticking is to drag heavy on the train. It does not create a jerking or lurching. This trouble only occurred once, as the train was leaving Mena. (Mena is

south of Page, so this trouble occurred before Page was reached). This sticking is caused by different things. If a train is cut in two, as at a road crossing, the air will leak out and cause the piston to come out, (Rec., 70-72). The train was jerking like it had a stuck brake (Rec., 97). There was no trouble with the air in moving out from Page (Rec., 216, 225, 227).

The Supreme Court of Arkansas appears to recognize that there was no proof of negligence with respect to the air brakes, for it says (Rec., 411):

It had been shown also that the engine and the air were in good condition.

The Court appears to rely, for proof of negligence, on an answer made by defendant's engineer, upon cross examination, which is quoted below.

The engineer described the departure from Page as follows:

Q. Describe how you moved your train out of Page?

A. Page is a place, where, when going north, it is a little down hill, and we had a long train and a large engine, which requires extra precaution in starting the train to avoid bumping the draw bars, and in order to start the train without bumping the cars we have to start slow and take out the slack gradually, but the engine at the time had a small amount of steam in the cylinders and I just released the independent air brake on the engine and the weight of the engine, together with the small amount of steam in the cylinders, was sufficient to start the head end of the train, and there was no steam used to pull the train, as the weight of the engine starting and the descending grade caused the whole thing to start without using steam.

Q. Now, when you did use the steam, describe the manner in which you used the steam? A. By opening the throttle very lightly at first and taking the slack out of the cars gradually. It requires considerable time to start one of those trains with a Mallet type locomotive.

Q. About how far, in your judgment, had you traveled before you began using steam? A. Between a quarter and a half mile.

Q. State whether or not up to that point there were any unusual or violent jerks in your engine or train? A. There was not.

Q. State whether or not in pulling your train out of Page there was any defect in your brake appliances? A. There was none.

Q. When you began using steam between a quarter and a half a mile north you say you applied the steam gradually? A. Yes sir.

Q. Did you make any violent jerks at that time? A. No sir.

(Rec., 218-219).

Upon witness being asked, on cross examination: "Suppose there had been a severe jolting and lurching of that train as it went out of Page what could have caused it," defendant objected, and plaintiff then asked what usually causes a severe jerking and lurching of the train. The Court, over defendant's objection, held that the question was proper, and witness answered: "I couldn't answer that question. I would have to know conditions."

Plaintiff then asked: "Now then, assuming the train did lurch and jerk unusually that night as it was going out of Page, what, in your opinion, would have caused it?" Defendant renewed its objection, which was overruled, and the engineer answered: "It could only have been caused by the engineer in charge using too much steam and starting the head end of the train too quickly." Witness was then asked:

Q. That did not occur? You didn't do that with your engine? A. No, sir, there was no jolt there (Rec., 221-222).

We submit that there is no evidence whatever that the engineer used too much steam, or started the head of the train too quickly. The engineer expressly denies it, and there is no other testimony on the subject. Also, the question was not proper, since there is nothing to show what the conditions were which the engineer took into consideration.

Furthermore, there was no such issue in the case, the allegation in the complaint being that the alleged jerking was due to negligence with respect to the air brake appliances.

The Supreme Court of Arkansas, with reference to the admission of this testimony, holds that defendant's objection that the evidence was incompetent and irrelevant was not a sufficient objection, (Rec., 411).

The evidence, however, was not competent for any purpose.

Where evidence offered is not competent for any purpose, a general objection for incompetency and irrelevancy is sufficient.

Lowenstein v. McCadden, 122 S. W., 426.

But, where the evidence offered is inadmissible for any purpose, * * * a general objection as to its admissibility on the ground that it is incompetent, immaterial, and irrelevant is sufficient.

Connor v. Black, 119 Mo., 136, 24 S. W., 186;

First National Bank v. Carson, 30 Neb., 104, 46 N. W., 276;

Espalla v. Richard, 94 Ala., 159, 10 So., 137;

Tozer v. N. Y. C. & H. R. R. Co., 105 N. Y., 659, 11 N. E., 846;

Snowden v. Pleasant Valley Coal Co., 16 Utah, 366, 52 Pac., 599.

There was no such issue in the case.

Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them.

Providence Rubber Co., v. Goodyear, 9 Wall, 788.

The plaintiff did not amend his complaint, and the Court instructed the jury as follows:

In the outset, you are instructed that the burden of proof is upon the plaintiff to prove the manner and cause of the death sued for, and that it resulted proximately; that is, directly, from one or more of the alleged acts of negligence in the complaint.

(Rec., 375).

(c) The plaintiff failed to prove negligence on the part of the defendant in receiving and transporting S. F. R. D. car 6239, and National Zinc Company car 17, with the equipment of ladders and handholds with which they were provided.

These are the two cars between which plaintiff contends that Old fell and was injured, although, as we have endeavored to show, there was no proof that such was the case.

Plaintiff's contention, as we understand it, was that S. F. R. D. car 6239 should have had an end ladder or an additional end handhold, and that National Zinc Company car 17 should have had some additional appliance.

S. F. R. D. car 6239 had side ladders, and one end handhold on each corner. National Zinc Company car had hand railings on the sides of the car, and handholds on the sills. (Rec. 186-187-199).

Both these cars were foreign cars belonging to other companies (Rec., 186) and were received by defendant in regular interchange in the conduct of interstate commerce. They complied with the present requirements of the Interstate Commerce Commission and Master Car Builder's Association, (Rec., 187, 195, 205-206, 232-233, 237, 240). None of the appliances with which the cars were customarily supplied were defective or missing, (Rec., 78, 186, 233, 236-237, 339). The testimony was to the effect that cars equipped like S. F. R. D. car 6239 and National Zinc car No. 17 were used by a majority of the railroads and received in interchange (Rec., 187); that the majority of the refrigerator cars have only side ladders (Rec., 188-189); that about fifty per cent of ordinary box cars are equipped with end ladders and sixty per cent to seventy-five per cent of refrigerator cars are so equipped, (Rec., 104, 108, 139). Box cars and refrigerator cars are of the same general style of construction. They are called house or box cars, (Rec., 183). The testimony was also to the effect that on the southwestern and western railroads the majority of the cars have the ladders on the sides of the cars, (Rec., 135).

There was a conflict of opinion on the question whether a side ladder or end ladder is the safer for use in passing from one car to another, but it was undisputed that if a man fell from an end ladder he would be in a much more dangerous position than if he fell from a side ladder (Rec., 128, 136, 143, 201, 207, 235).

The Interstate Commerce Commission has met the situation by requiring that all house and box cars, which include refrigerator cars, must be equipped both with end and side ladders by July 1, 1916, but that cars in service on or before July 1, 1911, need not be so equipped before July 1, 1916, unless, in the meantime, the cars are shopped for general repairs (Rec., 194-200).

As the evidence shows, cars like S. F. R. D. car 6239 and National Zinc car 17 are in common use on the railroads in this section of the country.

We understand the rule of law to be that an employer is not required to have the safest or best appliances, and that, if appliances furnished by him are in common use, he has complied with his duty.

The general rule has been stated by courts in many forms but in effect is that the master is bound to use appliances which are not defective in construction, but as between him and his employes he is not bound to use such as are of the best or most improved description if they are such as are in general use, since that is all that can be required.

Bailey on Personal Injuries, Vol. 1, p. 375.

In *Washington & Georgetown R. Co. v. McDade*, 135 U. S., 554, the rule is stated as follows:

Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed.

In *Southern Pacific Company v. Seley*, 152 U. S., 145, the court said:

There is a form of cast iron frog, in which the space between the rails at the apex of the frog is filled with cast iron. But the evidence clearly was that the defendant company used the unblocked frog, although at some places the cast iron frog was used. The weight of the evidence, as we read it in the bill of exceptions, plainly was that on the other great railroad systems of the West the unblocked frog was generally used.

The court, in holding that no negligence on the part of the railroad company was shown, cited as authority among others the case of *Schroeder v. Michigan Car Co.*, *infra*, saying:

In the case of *Schroeder v. Michigan Car Co.*, 56 Mich., 132, the supreme court of Michigan, per Cooley, J., said:

"From this state of facts it will appear that if the defendant has been guilty of any negligence in contributing to the injury, it is to be found in the fact that a machine is made use of which is not so constructed as to guard as well as it might against similar accidents. Had the machine been constructed with a shield over the cog wheels, this particular accident would probably not have occurred; and any one whose attention was drawn to the danger of such accidents would probably have perceived the desirability of such a shield. But the machine is shown by the evidence to be manufactured and sold by a prominent and reputable house, and much used throughout the country, and the defendant cannot be said to be exceptionally wanting in prudence in purchasing and making use of it. Such danger as would result from making use of it was perfectly apparent, and would seem to be easily avoided."

In *Kilpatrick v. Choctaw, O. & G. R. Co.*, 121 Fed., 13, (affirmed by this court, [195 U. S., 624] without opinion, on the authority of *Southern P. Co. v. Seley*, *supra*), the court said:

This decision (*Southern P. Co. v. Seley*, *supra*) therefore, as we construe it, clearly decides that so long as many railroads of the country use the unblocked frogs, believing such frogs to be ordinarily safe, and less liable to get out of order

and occasion derailments than blocked frogs, negligence cannot be imputed to a railroad company simply because it uses unblocked frogs. According to the doctrine so enunciated, it seems that railroad companies are at liberty to determine for themselves, in the light of their experience, which form of frog is preferable, so long as both forms are in common use, and that it is not competent for a jury to hold a railroad company guilty of negligence because it adopts one form of frog in preference to another.

In the present case, there is the additional element that these cars did not belong to the defendant, but were received by it in the regular interchange of cars in the transportation of interstate commerce.

Section 3 of the Interstate Commerce Act provides:

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith.

The Statutes of Arkansas contain a similar provision. Section 6771 of Kirby's Digest of the Statutes of Arkansas for 1904, page 1408, provides:

Every railroad company operating a railroad in this state shall cause all freight and passenger trains running on their roads to stop at all points on their roads where another railroad crosses, joins, unites, or intersects, and take and receive on their trains all passengers, freights, and mail which such railroad so crossing, joining, or intersecting has for shipment at such point, and shall carry the same * * * and no railroad company shall in any way discriminate against passengers or freight transported or conveyed by any intersecting railroad company.

In *Northern Pacific R. Co. v. Blake*, 63 Fed., 47, the court said:

The fact that railroad companies are now very generally required by statutory enactments to receive and transport cars

which are tendered to them by connecting carriers has led several courts to decide, after a very full and careful consideration of the question, that it is the right and duty of a railway company to receive and transport double-deadwood cars, such as are at the time in use on other railroads, if they are in good condition and free from defects, even though the use of such cars may enhance the risk to which a brakeman is exposed in the act of making couplings. It has been held, in effect, that the necessities of commerce and public policy alike demand that such cars should be received and transported by a railway company, even though it does not make use of such coupling appliances on cars, of its own construction, so long as such cars are in general use on other leading lines of railroad, and so long as many competent persons justify the use of such coupling appliances on the ground that they are not unnecessarily dangerous, and that certain advantages result from that method of construction. In line with these views it is also very generally held that the risk of getting hurt while coupling cars having double dead-woods is one of those ordinary risks of the employment which a brakeman assumes on taking service, especially if, as in the case at bar, he is an old and experienced railroad operative.

In the case of *Kohn v. McNulta*, 147 U. S., 240, the court said:

The intervenor was 26 years of age; he had been working as a blacksmith for about six years before entering into the employ of the defendant; he had been engaged in this work of coupling cars in the company's yard for over two months before the accident, and was therefore familiar with the tracks and condition of the yard, and not inexperienced in the business. He claims that the Wabash freight cars, which constituted by far the larger number of cars which passed through that yard, had none of those deadwoods or bumpers; but inasmuch as he had in fact seen and coupled cars like the ones that caused the accident, and that more than once, and as the deadwoods were obvious to any one attempting to make the coupling, and the danger from them apparent, it must be held that it was one of the risks which he assumed in entering upon the service. A railroad company is guilty of no neg-

ligence in receiving into its yards, and passing over its line cars, freight or passenger, different from those it itself owns and uses. *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Iowa 680, *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill., 365; *Michigan Cent. R. Co. v. Smithson*, 45 Mich., 212; *Hathaway v. Michigan Cent. R. Co.*, 51 Mich., 253; *Thomas v. Missouri Pac. R. Co.*, (Mo.) Mar. 14, 1892

It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer. *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189 (30: 1114); *Ladd v. New Bedford R. Co.*, 119 Mass., 412.

In *Thomas v. Missouri Pacific Railway Company*, 109 Mo., 204, the court said:

It is not negligence for a railroad company to receive and transport over its line cars of another railroad company which are of a different construction from its own cars, provided such foreign cars are not out of repair or damaged.

See also:

Woods v. Nor. P. R. Co., 36 Wash., 658;

Michigan Central R. Co. v. Smithson, 45 Mich., 212;

Pierce v. Bayne, 80 Fed., 988.

(d) Old was not an inexperienced employee.

Plaintiff claimed that Old was inexperienced, but the testimony showed that he was between 24 and 25 years of age; had been employed as brakeman on defendant's railroad for about five

months, and had had considerable previous railroad experience (Rec. 72, 147-149, 182). He had been working on this train from 9 or 10 o'clock A. M. to 8 o'clock P. M., and it was necessary for him to pass over the train in order to turn the retainers up and down. He must therefore have been familiar with the cars in the train. For that matter, the testimony shows that cars of various makes are constantly being handled over all railroads. This court has held a much shorter period of time sufficient for a brakeman to become experienced.

In *Kohn v. McNulta*, 147 U. S., 240, the court said (the italics are ours):

The intervenor was 26 years of age; he had been working as a blacksmith for about six years before entering into the employ of the defendant; he had been engaged in this work of coupling cars in the company's yard for *over two months before the accident, and was therefore familiar with the tracks and condition of the yard, and not inexperienced in the business.*

(c) Plaintiff failed to prove that Old contributed anything to the support of the beneficiaries.

The plaintiff sued for compensatory damages in the sum of \$15,000, and damages for pain and suffering in the sum of \$10,000, and the jury returned a verdict for the full amount, \$25,000. The question whether plaintiff was entitled to sue for pain and suffering is discussed under the second proposition in this brief.

The only evidence on the subject of damages was the following:

Old was between 24 and 25 years of age at the time of his death. He left a widow who was between 23 and 24 years of age and one child 5 weeks old (Rec., 147-150). At the age of 25 years the life expectancy, according to the tables, is 38.81 years, and at the age of 24, 39.49 years. Old earned \$65.00 to \$75.00 per month after the deduction by the Railway Company of the sum

due for his meal books; and Old's personal expenses, for clothing, shoes, and things of that kind, amounted to \$10.00 per month (Rec., 148-151).

There is no testimony whatever as to the amount, if any, which Old was accustomed to contribute to the support of his wife and child.

While it was Old's legal obligation to support his wife and child, yet we submit that the jury should have had testimony to guide it in the proper assessment of the damages.

A somewhat similar question will be discussed under the third proposition of this brief.

II.

The Supreme Court of Arkansas erred in holding that, under the Federal Employers' Liability Act, as amended, the plaintiff was not only entitled to recover damages by way of compensation for the financial loss to the widow and child of deceased, but that he "could also recover for the conscious pain and suffering which the husband and father endured after the injury, which survived to appellee as the personal representative of Old for the benefit of his widow and child."

We contend that the amended act should be interpreted as follows:

(a) The Federal Employers' Liability Act was intended to be complete in itself, so as to afford compensation to employes, and to their personal representatives in case of death, for the pecuniary loss suffered by the employes, or by their beneficiaries, and this rule applied in all cases of injuries to employes, and in all cases of injuries resulting in death whether death was instantaneous or not.

(b) It developed, from a judicial construction of the act, that, where an employe was injured, and subsequently died from *some other cause* than his injuries, his cause of action died with

him, so that those dependent upon him received no compensation, and it was thought by Congress to be desirable that such cause of action should survive, for the benefit of the same beneficiaries, and hence, section 9 was added to the original act, in order to provide for a survival of the cause of action in these circumstances.

(a) The original Act, whose purpose was to compensate certain designated beneficiaries for the pecuniary loss suffered by them through the death of an employe, omitted to make provision for the recovery of compensation where an injured employe died from some independent cause, so that his cause of action died with him. It was the purpose of Section 9 to supply this deficiency.

The original act (Sec. 1, Emp. Liability Act of April 22, 1908) provided:

That every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of the next of kin dependent upon such employe, for such injury or death. * * *

The purpose of the original act, in case the employe died *from the injury*, whether instantaneously or afterwards, was to compensate certain designated beneficiaries to the extent of their *pecuniary loss*. As this court said in *Michigan Central R. Co. v. Vreeland*, 227 U. S., 59:

The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. * * *

The distinguishing features of this act (Lord Campbell's Act) are identical with the Act of Congress of 1908 before its amendment. First, it is grounded upon the original wrongful injury of the person. Second, it is for the exclusive benefit of certain specified relatives. Third, the damages are such as flow from the deprivation of the pecuniary benefits

which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

In *Gulf, Colorado & Santa Fe Railway Company v. McGinnis*, 228 U. S., 173, the court said:

In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss.

In *North Carolina R. Co. v. Zachary*, 232 U. S., 248, the court said:

* * * there was neither averment in the pleadings nor evidence at the trial that deceased left a widow, child, parent, or dependent next of kin. Persons thus related to deceased are the respective beneficiaries of the action prescribed by the act of Congress, and the damages are to be based upon the pecuniary loss sustained by the beneficiary.

In the case of *Norfolk & W. R. Co. v. Holbrook*, 35 Sup. Ct. Rep., 143, a case in which the injury occurred after the act was amended by the addition of section 9, the court said:

Under the Employers' Liability Act, where death is instantaneous, the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same.

Early decisions construing the original act made it clear that in no case did the right of action of the employe survive. For instance, in the case of *Fulgham v. Midland Valley R. Co.*, 167 Fed., 660, decided February 19, 1909, the court, l. c. p. 664, said (*italics ours*):

In the opinion of the court the right of action given to the injured employe by the act of April 22, 1908, does not

survive to his personal representative in the event of his death, but, as at common law, perishes with the injured person. *I might add that this conclusion is in harmony with the known purposes of the act, which was intended to make some provision for the unfortunate family of the deceased employe, and not to make provision for the creditors of his estate.* Can it be supposed that Congress would make a railroad company the insurer of an employe, killed in its service, for the purpose of paying the debts the employe had incurred in his lifetime? And yet that would be the inevitable result if the contention of plaintiff's counsel is sound, for whatever is recovered on account of injuries sustained and for which the injured employe had a cause of action in his lifetime must go to his estate. Indeed, such is the prayer of the complaint in this very case.

The above decision to the effect that, under the original act, the right of action of the employe did not survive, is supported by the decisions of this court.

In *Michigan Central R. Co. v. Vreeland*, 227 U. S., 59, the court said:

The Act of 1908 does not provide for any survival of the right of action created in behalf of an injured employe. That right of action was therefore extinguished. The act has been many times so construed by the circuit courts. We cite a few of the cases. *Fulgham v. Midland Valley R. Co.*, 167 Fed., 660; *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed., 495.

In *American Railroad Company v. Didricksen*, 227 U. S., 145, the court said:

The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death

of the injured employee. The damage is limited strictly to the financial loss thus sustained.

In *Garrett v. L. & N. R. Co.*, 35 Sup. Ct. Rep., 33, the court said:

The third count of the declaration under consideration states no cause of action. The employe's right to recover for injuries did not survive him.

The decision of the lower Federal courts in *Fulgham v. Midland Valley R. Co.*, *supra*, and *Walsh v. N. Y., N. H. & H. R. Co.*, *supra*, therefore, had demonstrated, before the passage of the amendment of April 5, 1910, that in no case did the right of action of the injured employee survive. What omission was there to be supplied, having in view the scope and purpose of the act? If the employee lived, he was provided, under section 1, with a complete remedy for the recovery of all damages suffered by him through the wrongful act or default of the common carrier. If the employee died *from his injury*, before recovering judgment for the damages sustained by him, the designated beneficiaries were provided with a complete remedy, under section 1, for the recovery of all that they were entitled to, *i. e.*, their pecuniary loss.

This was true whether death resulting from the injury was instantaneous or not. In *Michigan Central R. Co. v. Vreeland*, 227 U. S., 59, the court said:

There is no express or implied limitation of the liability to cases in which the death was instantaneous.

The only omission, therefore, in the original act, was the failure to provide for the survival, in favor of the designated beneficiaries, of the right of action of the employee in case of his death, from some cause other than the injury. The purpose of the act, and the history of the passage of the amendment of April 5, 1910, show that the addition of section 9 was in order to cover this last mentioned contingency and that alone.

Section 9, which was added by the amendment of April 5, 1910, provides:

That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.

As will be noted, the same words are used to designate the beneficiaries as in section 1, and it is provided that they shall be the husband or widow and children, or parents, or next of kin, dependent upon the employe. The act does not provide that the cause of action of the deceased employe shall survive in favor of his estate, as is often done in the case of state statutes. See *Fulgham v. Midland Valley R. Co.*, 167 Fed., 660, in which the plaintiff's petition was modeled upon the Arkansas statute and in which the court, 1. c. p. 661, said of the Arkansas statute (*italics ours*):

It is apparent that these two separate and distinct causes of action are modeled upon the legislation of the State of Arkansas (Kirby's Digest, secs. 6285-6290), which were interpreted in the case of *Davis v. Railway*, 53 Ark., 117, 13 S. W., 801, 7 L. R. A., 283. In that case, one cause of action was given under section 6285, and the other under sections 6289 and 6290. *The former was for the benefit of the estate; the latter for the benefit of the widow and next of kin.*

The decision in the above case is supposed to be chiefly responsible for the addition of section 9 of the Act, but Congress did not, in the amendment, make the deceased employe's cause of action survive for the benefit of his *estate*. Congress made it survive for the benefit of the same *dependent relatives* who had been specified in section 1. Under the terms of both sections, if there is no dependent relative, there is no survival.

In *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed., 769, the court said (*italics ours*):

The right of action given to the dependent relatives by the act is independent of that given to the decedent, and does

not include any damages that he might have recovered from the carrier, had he lived, but is given to them for the pecuniary loss which they may have sustained because of his untimely death. Prior to the amendment of April 5, 1910, the right of recovery given to the injured employe did not survive his death, but died with him. *Michigan Central R. R. Co. v. Vreeland*, 227 U. S., 59, 33 Sup. Ct., 192. By that amendment the right of recovery given to decedent survives his death, but not, however, for the benefit of his estate, but of specified relatives in the order stated, and *for the pecuniary loss which they may have sustained because of his death. If no such relative survives the decedent, then no right of recovery is given by the act to his personal representative.*

In *Melzner v. Northern Pac. R. Co.*, (46 Mont., 162), 127 Pac., 1003, the court said:

The first section of the federal statute, *supra*, omits any provision on this subject (of survival). Hence, as the act stood prior to the enactment of Section 9, it was held, under the common-law rule, that, upon the death of the injured employe, the right of action given him died also. * * * Clearly section 9 was intended to supply this defect and had no other purpose, because it declares that "any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit," etc., naming the beneficiaries mentioned in section 1. It is to be observed that, whether the action is for a recovery for the death of the employe or for injuries sustained by him for which he might have maintained an action, the person who must bring or continue the action is the same, viz., the personal representative. The beneficiaries in each case are the same.

This brings us to the inquiry: When the action is brought by the personal representative, is it necessary to allege in the complaint that there are in existence persons answering the description of the beneficiaries named in the statute? This must be so. The action is statutory. Without the statute, the right to bring it would not exist. The representative is vested with the right to bring it, but only for the benefit of those who are named in the statute. He is thereby

made a statutory trustee for them, not for the benefit of the decedent's estate. The fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is no beneficiary within the description of the statute, there is no right of action; for the liability of the defendant is made contingent upon the existence of one or more beneficiaries. If there are none, there is no liability.

We may consider, not only the defect in the original act as pointed out by the courts, which the amendment was presumably intended to remedy, but we may also consider the legislative history of the amendment; for it is well settled in this court that reference may be had to the legislative history of such acts of Congress, for the purpose of aiding in the ascertainment of the intention of Congress in passing the legislation. See *Johnson v. Sou. Pac. Co.*, 196 U. S., 1.

The intention of Congress to supply, by the addition of section 9, the omission in the original act, which permitted no recovery where the injured employe died from some other cause, is made plain in the legislative proceedings when the passage of the amendment was under consideration.

Mr. Sterling, a member of and speaking for the House Committee (Congressional Record, 61st Congress, 2nd Session, Vol. 45, p. 2253), said (*italics ours*):

The third amendment relates to the survival of the action. One of the courts in Connecticut held that under this law where the injured party died before action was commenced, or after action was commenced, *from some other cause than the injury*, the action did not survive to the personal representative of the deceased. This provides that the action shall survive to the personal representative for the benefit of the widow or next of kin in the order named in the original law.

In further explanation of this amendment Mr. Sterling (p. 2258 of said Congressional Record) also said (*italics ours*):

It simply provides that where the action survives, then the damages are *limited to compensatory damages*; for in-

stance, if the injured man brings a suit and dies before judgment *from other causes than the injury*, then, under this provision of the bill, the action survives to recover *compensatory damages only*.

It is therefore clear that the passage of this act of April 5, 1910, was for the sole purpose of providing compensatory damages in the event that the injured party died from other causes after the injury and before recovery.

The purpose above stated is carried out in the wording of section 9 by providing that the cause of action shall survive, for the benefit of the same dependent relatives who are named in the original act; and also, by providing that "in such cases there shall be only one recovery for the same injury."

(b) The personal representative has only one right of action, which is under Section 1 in all cases except where the employee dies from some cause other than the injury, in which latter case his right of action is under Section 9.

It is well settled that the right of action given to the employee under the act is an entirely different and distinct right of action from that given to the beneficiaries on account of the death of the employee. In *Michigan Central R. Co. v. Vreeland*, 227 U. S., 59, the court said:

The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured for the loss and damage resulting to them financially by reason of the wrongful death. * * * This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.

In *Garrett v. L. & N. R. Co.*, 35 Sup. Ct. Rep., 33, the court said:

The questions presented are: First, whether, under the Employers' Liability Act of 1908 (before amendment of April 5, 1910) the administrator of one who died of painful injuries suffered while employed in interstate commerce by a railroad engaging therein can recover damages for the benefit of the estate (third count); and, second, whether, if such administrator sue for the benefit of the employe's parents, there being no surviving widow or husband or child, it is necessary to allege facts or circumstances tending to show that, as a result of the death, they suffered *pecuniary* loss (first and second counts) * * * It is now definitely settled that the act declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury: (1) liability to the injured employee for which he alone can recover; and (2), in case of death, liability to his personal representative "for the benefit of the surviving widow or husband and children," and if none, then of the parents, which extends only to the *pecuniary* loss and damage resulting to them by reason of the death.

In *American Railroad Company v. Didricksen*, 227 U. S., 145, the court said:

The cause of action which was created in behalf of the injured employe did not survive his death, nor pass to his representatives, but the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute.

It is clear that there cannot be a recovery on both causes of action, for the act provides "there shall be only one recovery for the same injury."

In *St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterly*, 228 U. S., 702, the court says:

In the case of death, the only action is one for the benefit of the next of kin. Sec. 1. *Michigan Central R. Co. v. Vreeland*, 227 U. S., 59, 67, 68; *American R. Co. v. Didrick-*

sen, 227 U. S., 145; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S., 173, 175. Therefore the ruling of the state court was wrong. The amendment of April 5, 1910, Chap. 143, Sec. 2, 36 Stat. at L. 291, U. S. Comp. Stat. Supp., 1911, p. 1325, in like manner allows but one recovery, although it provides for survival of the right of the injured person. The amendment, however, does not apply to this case, as the death occurred in August, 1909.

Thornton in his work on *The Federal Employers' Liability and Safety Appliance Acts*, 2nd Ed., in discussing the effect of Section 9, says, p. 167 (*italics ours*):

Under the Federal Statute, the administrator has his option, when the deceased has brought an action during his lifetime to recover damages, to either prosecute that action or dismiss it and bring his own action; *but he cannot wage both causes of action; he must take his choice.*

We think the author would have stated it more correctly if he had said that only one cause of action may be waged, and the law makes the election or choice in determining which cause of action may be waged. Section 9 should be construed in harmony with the remainder of the act. As stated above the original act fully covers liability to the employe if he survives the injury; and also covers liability to the relatives of the employe, in case he dies as a result of the injury. The only matter not covered by the original act is the survival of the employe's right of action, in case he dies before recovering damages, from some cause other than the injury. Therefore, the latter is the only case in which the employe's right of action survives to the beneficiaries. This is confirmed by the consideration that the beneficiaries under both section 1 and section 9 are limited to their pecuniary loss. If the employe dies as a result of the injury, the beneficiaries may recover under section 1 all that they are entitled to, *i. e.*, their full pecuniary loss. It would serve no purpose to permit allegations also under section 9, which would not entitle them to anything more, and would be calculated to mislead the jury.

The decisions of the various state courts on the question of the right of recovery under their death statutes and survival statutes, depend largely, of course, on the history and terms of the statutes of each state. It is held in the following states having both a death statute and a survival statute, that there cannot be a recovery upon both the death statute and the survival statute.

In *Dolson v. Lake Shore & M. S. Ry. Co.*, 128 Mich., 444, 87 N. W., 629, the syllabus is as follows:

Comp. Laws 1897, known as the "Death Act," provides that whenever the death of a person shall be caused by any wrongful act, neglect, or default, which would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, then the person or corporation causing the death shall be liable to an action for damages in favor of the personal representatives of the deceased for the benefit of the widow or next of kin. How. Ann. St., Sec. 7397 (the "Survival Act") provides that a cause of action for negligent injuries to the person shall survive. Held, that personal representatives had a right of action under the survival act, where the testimony showed that the deceased had survived for a short time after being injured by defendant's negligence, but that recovery could not be had under both acts.

In *Hackett v. Louisville, St. L. & T. P. Ry. Co.*, 95 Ky., 236, 24 S. W., 871, the court said:

Now, this court has decided, and settled the question, that, where certain acts cause death, they cannot be divided so as to make two actions,—one to recover for the suffering caused, and the other to recover for death. The party must elect. See *Conner's Adm'x. v. Paul*, 12 Bush, 147. Here, as said, the amendment and petition make two counts, which are in effect two causes of action, when the facts causing the death constitute but one cause of action; and, as they cannot be divided so as to make two actions, neither can two counts, which are in effect two causes of action, be maintained on them.

See, also, *Owensboro & N. Ry. Co. v. Barclay*, 102 Ky., 16,

43 S. W., 177; *McCafferty v. Pennsylvania R. Co.*, 193 Pa., 339, 44 Atl., 435; *Sawyer v. Perry*, 88 Me., 42, 33 Atl., 660.

Other state courts have held that the exclusive remedy in case the injury results in death is under the death statute, the survival statute applying only where the injured party dies from some other cause than the injury. As the question is discussed in detail in *Lubrano v. Atlantic Mills*, 19 R. I., 129, 32 Atl., 205, we quote at some length from the decision in that case, in which the court said:

The question therefore is whether, under our statutes, an administrator has the right to maintain two actions for negligence resulting in death,—one for the benefit of the widow and next of kin, according to our form of Lord Campbell's Act, and another for the damage to the person, under our statute for the survival of actions.

After discussing various cases, the court continues:

That case states the principle upon which the compensatory act is founded. It creates no new cause of action by reason of the death, but gives a new right of recovery in substitution for the right of action which the deceased would have had if he had survived. Upon this principle the new remedy must be exclusive, since otherwise there would be two recoveries for the same cause of action, namely, the negligence of the defendant, which is the cause of action on which the deceased would have sued at common law, if he had survived. Moreover, the recognized rules of construction lead to the conclusion that the remedy for the death is exclusive. While the act relates to a remedy, it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed at common law, and so it should be strictly construed. The provisions for survival of actions for damages to the person, and for the remedy for the death, have been embodied in the same statute in this state since 1857, although the latter was first adopted. The general provision should not be construed to modify the special, since the intention to modify the former statute by giving an additional remedy is not plain, and both can stand together; the

act for survival embracing damages to the person other than those which result in death. This is the construction which was given to precisely similar provisions in *Holton v. Daly*, 106 Ill., 131, where it was held that the only cause of action was the wrong done, irrespective of consequences, and that a statute of survival, subsequently passed, did not give a remedy additional to that of the prior act relating to the death. That case had been commenced by the deceased in his life-time, but the court held that it could not proceed without amendment alleging and suing for the death. So, in *Railroad Co. v. O'Connor*, 119 Ill., 586, 9 N. E., 263, it was held that where the plaintiff, pending an action for injuries, dies from some other cause than the injury, the action survives, and may be prosecuted by his administrator. In *McCarthy v. Railroad Co.*, 18 Kan., 46, where both provisions for an action for death and for survival of an action for injury to the person had been embodied in a revision, as in our own statutes, it was held that they must be construed *in pari materia*, and that the latter provision applied only to cases where the death did not result from the injury. This decision was followed in *Hulbert v. City of Topeka*, 34 Fed., 510; but Mr. Justice Brewer, although he had concurred in the opinion, as a member of the state court, and felt constrained to follow it, expressed a doubt of its correctness. See, also, *Hurst v. Railway Co.*, 84 Mich., 539, 48 N. W., 44; *Munro v. Reclamation Co.*, 84 Cal., 515, 24 Pac., 303; *Hurtigan v. Southern Pac. Co.*, 86 Cal., 142, 24 Pac., 851; *Andrews v. Railroad Co.*, 34 Conn., 57; *Putman v. Southern Pac. Co.*, (Or.), 27 Pac., 1033. A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible. The measure of pain and suffering, or estimated damage to one's estate, cannot be so definitely marked as to limit liberality of a sympathetic jury.

See also, *Martin v. Missouri Pacific R. Co.*, 58 Kan., 475, 49 Pac., 605.

Cases arising under statutes of which the Arkansas Statute is an example are not in point, since, as stated in *Fulgham v. Mid-*

land Valley R. Co., 167 Fed., 660, one cause of action under the Arkansas Statute is for the benefit of the *estate*, the other, for the benefit of the *widow* and *next of kin*.

The purpose of the Federal Act is to provide for certain dependent relatives whether the right of action is under section 1 or section 9. The amendment specifically provides that there shall be only one recovery.

We submit that the purpose of the act, as declared in the decisions of this court, as well as the history of the passage of the amendment, fully support the construction of the amended act which we contend for.

III.

Instruction No. 10, given by the lower court on motion of the plaintiff, did not correctly instruct the jury with regard to the assessment of damages under the Federal Employers' Liability Act as amended, and the Supreme Court of Arkansas erred in holding the instruction correct.

Instruction No. 10 was as follows:

If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering, if any, the deceased underwent from the time of his injury until his death, and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time, and the deceased's earning power and rate of wages. From the amount thus ascertained, the personal expenses of the deceased should be deducted, and the remainder reduced to its present value should be the amount of contribution for which plaintiff is

entitled to recover, if your verdict should be for the plaintiff (Rec., 374).

We submit that the instruction was erroneous in the following particulars.

(a) *The instruction directed the jury to award damages, both on account of the pain and suffering of the decedent, and of the pecuniary loss of the beneficiaries, through the death of the decedent.*

This point has already been discussed as the second proposition in this brief.

(b) *The instruction did not require the jury to state separately the amounts awarded respectively to the widow and child of the decedent, nor to state separately the amounts awarded under Section 1, and Section 9, of the Act.*

In the case of *Gulf, Colorado & Santa Fe Railway Co. v. McGinnis*, 228 U. S., 173, the Court said:

The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return.

L. & N. R. Co., v. Stewart, 156 Ky., 550, 161 S. W. 557.

It is essential that the amount be apportioned in order that each beneficiary may receive his or her proper share. It is to the interest of the defendant that the amount awarded to each beneficiary be stated separately, and that the amount awarded under each count be stated separately, (if there can be a recovery both under Section 1 and Section 9, which we deny) in order that there may be, to this extent, at least, a check on the verdict of the jury.

The Supreme Court of Arkansas discusses this question, but states in its opinion (Rec., 417) that defendant did not ask that the amounts be separately stated. We respectfully submit that the record shows that the defendant did object to the instruction on

this ground (Rec., 344); and that that was the only way in which defendant could call the matter to the Court's attention, since the Court stated to counsel for defendant (Rec., 342):

I am anxious to proceed with the case and I have not time to hear your specific objections to the instructions now. You may dictate them to the stenographer and present them later.

(c) *The instruction did not limit the child's right of recovery to its pecuniary loss, during the years of its minority, and the widow's right of recovery to her pecuniary loss, during her expectancy of life.*

Old was between 24 and 25 years of age at the time of his death, and the plaintiff introduced in evidence a table showing that his expectancy of life was 38 years. The child was five weeks old at the time of Old's death. Under this instruction, the Court permitted the jury to assess damages in favor of the child until the latter should arrive at the age of 38 years. The child's recovery should have been limited to its minority. The widow's recovery should have been limited to the joint life expectancy of herself and the deceased.

The damages to the widow should be calculated on the basis of their joint lives; the damages to the minor children, for the loss of support, should be confined to their minority.

Tiffany, Death by Wrongful Act, 2nd Ed., p. 337.

In *B. & R. Turnpike Road v. State*, 71 Md., 574, 18 Atl., 884, the Court said:

The damages to which they (the widow and infant children) are entitled under the statute are damages by way of compensation for the pecuniary loss sustained by them in consequence of the death of the party resulting from the wrongful act of the defendant * * *. In estimating the pecuniary loss or prospective damages sustained by the infant children, the jury are to take into consideration their ages and condition in life and what they might reasonably be

expected to receive from the deceased for their support and education up to the time of their majority.

In *Rouse v. Detroit Electric Railway*, 128 Mich., 149, 87 N. W., 68, an instruction as to damages under a death statute was held erroneous for the reason, among others, that the right of recovery on behalf of the children was not limited to their minority. The Court said:

Damages should have been limited to the expectation of the life of the widow. As to the children, no damages could be recovered for their support after they each became of age, and none for the maintenance of the married daughter.

See also, *Duval v. Hunt*, 34 Fla., 85; *Dellahunt v. United Telephone & Telegraph Co.*, 215 Penn., 241; *Atlantic & W. P. Ry. Co. v. Venable*, 67 Ga., 697; *McPherson v. St. L., I. M. & S. Ry. Co.*, 97 Mo., 253; *Hoadley v. International Paper Co.*, 72 Vermont, 79.

(d) *The instruction did not require the jury to limit the damages to such an amount as one of decedent's character and disposition might be expected to contribute to his wife and child.*

The instruction directed the jury to award to the plaintiff the full amount of the decedent's probable earnings, less what were denominated his personal expenses. That portion of the instruction (Rec., 374) was as follows:

* * * In fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time, and the deceased's earning power and rate of wages. *From the amount thus ascertained, the personal expenses of the deceased should be deducted, and the remainder, reduced to its present value, should be the amount of contribution for which plaintiff is entitled to recover.*

The Supreme Court of Arkansas holds that the instruction is correct, on the authority of its own decision in the case of *Railway v. Sweet*, 60 Ark., 550 (Rec., 416).

We submit, however, that this instruction was incorrect. The amount the beneficiaries were entitled to recover was their pecuniary loss through the death of decedent.

Old may have devoted a portion of his earnings to the support of his parents or other relatives. Common experience suggests a multitude of ways in which he may have expended a part of his net earnings, otherwise than in the support of his wife and child.

When the wife is the beneficiary, the measure of damages is the probable amount she would have received if he had lived, and not his probable earnings.

Thornton, The Federal Employers' Liability and Safety Appliance Acts, 2nd Ed., p. 182.

This case is a good illustration of the need for the fixing by this Court of definite and clear principles under which the jury shall ascertain the amount of damages to be awarded under the Federal Employers' Liability Act. The jury awarded the plaintiff \$15,000 as compensatory damages. There is not a word of testimony to show the care and attention which decedent would have bestowed upon his family, consequently, there could be no damages awarded on account of the loss of such care and attention. Old's earnings, after the deduction of meal books, and personal expenses for clothing, shoes, and such things, amounted, according to the testimony, to \$55.00 to \$65.00 per month, an average of \$60.00 per month, or \$720.00 per year. The sum of \$15,000 at six per cent per annum would yield \$900.00 per year, thereby giving to Old's widow and child considerably more than his net earnings, and leaving them also in possession of the full sum of \$15,000, no matter how long they may have lived. As previously stated, the trial Court reduced the amount of the judgment to \$18,000, and the Supreme Court of Arkansas, by a process of reasoning which we contend is not authorized, assume that \$14,518 of this sum may be considered as the portion awarded for compensation. The latter sum, however, at 6% per annum, would

yield \$871 per annum for the support of the wife and child, and leave intact the principal sum of \$14,518.

The jury awarded \$10,000 for Old's pain and suffering during the two hours during which he lived after his injury.

If \$10,000 is to be awarded for pain and suffering for two hours, how much might a jury not award in case the injured person lived for six months or a year?

IV.

The Supreme Court of Arkansas erred in holding that the orders of the Interstate Commerce Commission, with respect to safety appliances, were properly excluded from evidence by the lower court, and in approving the action of the lower court in that behalf.

The Supreme Court of Arkansas in its opinion (Rec., 410), says:

There was no error prejudicial to appellant in refusing to permit it to show that, under the rules of the Interstate Commerce Commission appellant was not required to put handholds on the ends of the cars complained of until July 1, 1916, unless the cars were shopped for general repairs. This ruling of the Court was not prejudicial to appellant because the effect of the testimony was only to show that in the opinion of the Interstate Commerce Commission it was necessary for cars like the one under consideration to be equipped with handholds or end ladders in order to insure as far as possible the safety of employees who were required to use them. The fact that the Interstate Commerce Commission postponed the time for equipping the cars that were then in service did not relieve the appellant of the duty of exercising ordinary care to furnish its employees with safe appliances, and to provide them a safe place in which to do their work. The Interstate Commerce Commission was without power to exempt the carrier from liability caused by its negligence.

We have already, under the first proposition in this brief, discussed the question of defendant's common law duty with respect

to the cars which were claimed to be insufficiently equipped with ladders and handholds.

The evidence showed that these two cars were foreign cars, not belonging to the defendant, which were received in the regular interchange of cars with other railroad companies, in the conduct of interstate commerce. These cars complied with the rules of the Master Car Builders' Association and the Safety Appliance Regulations prescribed by the Interstate Commerce Commission (Rec., 187, 233, 237). We contend that Congress, by passing the Safety Appliance Acts, and delegating to the Interstate Commerce Commission the duty of making rules and regulations governing safety appliances, has taken entire charge of this subject, and that defendant is not guilty of negligence in operating its own cars, so long as they comply with such regulations; and with even greater reason, that it is not guilty of negligence in receiving foreign cars in interstate commerce, if they comply with those regulations.

Congress, acting through the Interstate Commerce Commission, has prescribed what shall be done, and when it shall be done; and it is not competent for juries, or even State Legislatures, to make other requirements.

T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426;

Northern Pac. Ry. Co. v. Washington, 222 U. S., 370;

Erie Railway Co. v. New York, 233 U. S., 756.

V.

The Supreme Court of Arkansas erred in holding that the defendant was not entitled to remove the case to the Federal Court, and in approving the action of the lower court in denying the defendant's petition for removal.

The defendant in due time filed its petition and bond for removal of this cause to the proper Federal Court, on the ground of diversity of citizenship, contending that removal on this ground,

of a case arising under the Federal Employers' Liability Act, is not prohibited by the provisions of the Employers' Liability Act, nor of the Judicial Code; and, if so prohibited, that such prohibition is in conflict with the fifth amendment of the Constitution of the United States, and is void.

The question was passed on by the Supreme Court of Arkansas, which said (Rec., 407):

The court did not err in denying the petition for removal to the Federal Court.

Defendant's contention that a proper construction of the acts in question does not prevent a removal of such a case, when requisite diversity of citizenship exists, is well stated in *Van Brimmer v. Texas & Pacific Railway Company*, 190 Fed., 398; where the court said:

I am unable to bring myself to the conclusion that the amendment deprives a litigant of the right to remove his case to the federal court who had that right independent of the employers' liability act. I hold that the amendment in question does no more than to provide that, where a cause of action arises under the employers' liability act, the suit should not, for that reason, be removed, but that it does not affect the right of removal in cases where the right exists by virtue of some other law. Cases of federal jurisdiction are divided into two classes: (1) Where the jurisdiction is dependent on the character of the parties, as, for instance, citizens of different states, corporations with federal charters, citizens who, on account of prejudice or local influence, cannot obtain justice in the state courts, etc. (2) Where the jurisdiction is dependent on the subject-matter or character of the suit, as where the federal constitution or laws are involved. Cases under the employer's liability act fell within the second class, and that constituted the reason why they might be removed to the federal court until the passage of the amendment of April 5, 1910. But can it be supposed that, in a case where a defendant could not obtain justice in the state courts on account of prejudice or local influence, Congress intended to deprive such defendant of the right to take the case to the

United States court simply because the cause of action arose under the employers' liability act? The purpose of the provisions of the law allowing removals in cases of prejudice and local influence was to insure justice and fair trials in court to all citizens of the United States, and these objects would be defeated in every case of prejudice or local influence, where the cause of action arose under the act of April 22, 1908, as amended, if the amendment in question is given the effect contended for by the plaintiff.

The law provides that the courts of the United States shall have jurisdiction over controversies between citizens of different states, and that in this class of cases the right of removal exists where the suit has been instituted in the state court. The purposes intended to be accomplished by this legislation are too patent to need mention, and yet, if the amendment of April 5, 1910, be given the construction urged in argument by the plaintiff, even in this class of cases, the right of removal would be taken away where the cause of action arose under the employers' liability act. It is not conceivable that Congress intended to confer any such exceptional privilege upon the one class of citizens mentioned in that act, to the exclusion of all other citizens.

If, however, those acts do prohibit such removal, we contend in the state court and contend here, that such a provision conflicts with the 5th Amendment to the Constitution of the United States, and is therefore invalid. If it be true, as contended by plaintiff, that Congress may restrict the right of removal, and not grant it to the full extent allowable under the provisions of the Constitution, it is none the less true that, in legislating on the subject, Congress must observe the requirements of the Fifth Amendment to the Constitution. In restricting the right of removal, Congress has heretofore observed the rules of proper classification and equality of treatment in its legislation on this subject; for instance, in restricting the right of removal to cases involving not less than a certain amount of money, all litigants are treated alike. In the present case, however, only defendants under the Federal Employers' Liability Act are thus discriminated against.

So far as we know, no good reason has been given for this discrimination, which appears to be entirely arbitrary. It cannot be because the suits are personal injury suits. The plaintiff, in cases arising under the Federal Employers' Liability Act, is allowed to sue in the Federal court, if he so elects. Suits for personal injury arising under state law, are removable where the requisite diversity of citizenship exists. If removal in such cases is prohibited, the curious result is reached that a defendant may remove a personal injury case to the Federal court if it arises under the state law, but may not remove it, if it arises under the Federal law. It is defendant's contention that the prohibition of removal of cases arising under this act conflicts with the Fifth Amendment to the Constitution of the United States, and is therefore void.

We submit that, on account of the errors pointed out in this brief, defendant is entitled to have the case reversed; also that, because of plaintiff's failure to prove facts sufficient to show liability, defendant is entitled to a judgment in its favor.

Respectfully submitted,

SAMUEL W. MOORE,

FRANK H. MOORE,

JAMES B. McDONOUGH,

Attorneys for Plaintiff in Error.

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JAMES D. MAHER
CLERK

IN THE
**Supreme Court of the
United States**
OCTOBER TERM, 1914

KANSAS CITY SOUTHERN RAILWAY
COMPANY. _____ Plaintiff in Error

vs.

No. 538

SAM E. LESLIE, ADMINISTRATOR OF THE
ESTATE OF LESLIE A. OLD, DECAS-
SED _____ Defendant in Error

IN ERROR TO THE SUPREME COURT OF THE
STATE OF ARKANSAS

BRIEF OF THE DEFENDANT IN ERROR
ON THE MERITS

W. P. FRAZELL,
Counsel for Defendant in Error.

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BRIEF OF THE DEFENDANT IN ERROR
ON THE MERITS

We have, in a measure, discussed all the questions which we considered involved in this case in our brief on the motion to dismiss or affirm, but since the case has been ordered placed on the Summary Docket without disposing of the motion, it is deemed prudent to submit the following additional brief on the merits of the case; and in doing so, we do not wish to be understood as waiving or abandoning any of our contentions set forth in the former brief, but instead, we desire to add this as a supplement thereto. We

wish further to state that at the time of this writing (April 7th) we had not been furnished with a copy of the brief of Plaintiff in Error on the merits of the case, hence in discussing the questions we can only anticipate the contentions and arguments of counsel for Plaintiff in Error.

Since the case has been, as we think, sufficiently stated in our former brief we will omit any further statement and proceed directly to a discussion of the questions which we consider involved on this Writ of Error.

**REQUEST FOR DIRECTED VERDICT. NO ERROR
IN REFUSING THE REQUEST.**

It is seriously contended by counsel for Plaintiff in Error in their brief in opposition to the motion to dismiss or affirm, "That the denial by the highest court of the State of the contention of the defendant that a verdict should have been directed in its favor, because there was no substantial or sufficient evidence to support a verdict for Plaintiff, raises a Federal question reviewable by this Court." This contention is based upon the theory that because the action is predicated upon a Federal statute, the question as to whether there is evidence to support the verdict is one of law and necessarily involves such a Federal question as will give this Court jurisdiction to review the evidence.

If it be conceded that this proposition is correct, it necessarily follows also, that the Court will only

review the evidence to the extent necessary to ascertain if there is any evidence considered in its most favorable light for the Defendant in Error, from which the jury could have reasonably inferred that the negligence complained of contributed to the injury of the decedent, and the very moment the Court ascertains there is such evidence, then we submit, it will pursue the investigation of the testimony no further, because this Court is not concerned at all with the weight of evidence.

Were this not true, this Court would be required to review in any suit brought under a Federal statute, upon the request of either party for a directed verdict, all the evidence, notwithstanding the testimony to sustain the verdict should be preponderating.

The McWhirter case cited by Plaintiff in Error, we submit is not in conflict with this conclusion. That was a suit predicated upon the hours of service Act. The testimony showed that the injured employee was worked either five or seven minutes over the sixteen hours prescribed in the Act. There was no testimony nor even offer of any testimony, that the working over time in any manner contributed to the employee's injury. The State Court held, in effect, that it was unnecessary to make such proof because the railroad company having worked the employee more than 16 hours and the injury having occurred while he was thus being worked in violation of the Act, this, of itself, created an absolute liability against the railroad company under the Employer's Liability Act.

This Court held the State Court committed error in its construction of the Act and held further that it was not only necessary in order to create liability, that the plaintiff show that he worked overtime, but that the work overtime in some manner contributed to his injury, and that there was neither proof or offer of proof that the five or seven minutes over work in any wise contributed to the injury, and because there was no testimony tending to show that the working over time in any manner contributed to the injury of the employee, the request for a preemptory instruction for the railroad company, became a question of law and was reviewable by this Court.

"Questions of negligence do not become questions of law to be decided by the Court except where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Gardner vs. Mich. Cen. R. Co., 150 U. S., 439.

Kreigh vs. Westinghouse, etc. & Co., 214 U. S., 249.

It is contended, however, there is nothing in the testimony tending to show that the acts of negligence alleged, and which the proof tends to establish, in any manner tends to show that the negligence was the proximate cause of the injury of the decedent, and the jury should not have been permitted to conjecture

or guess at the proximate cause of his death.

It is an easy matter to make this statement, but it is quite difficult to sustain it from the record in this case.

The question was submitted to the jury under an instruction (No. 9 R. 372) which was quite favorable to the Plaintiff in Error and which we think safeguarded all of its rights upon this question. The jury were instructed that it devolved upon the Plaintiff to establish not only the negligence complained of, but that such negligence also was the cause of the injury; that this causal connection must be established by evidence as a fact, and not to be left to mere speculation and conjecture. After being thus cautioned against guessing at the proximate cause of decedent's death, the jury found against the contention of the Plaintiff in Error, and unless it be shown that the testimony was such that no recovery could be had upon the facts in evidence, upon any view that could be properly taken of them, the case should not have been withdrawn from the jury, and in determining that question the evidence must be considered in its most favorable aspect to the plaintiff below.

Meyer vs. Pitzberg Coal Co., 233 U. S., 184.

Humes vs. United States, 170 U. S., 210.

Choctaw O. & G. Ry. Co. vs. McDade, 191 U.

S. 64.

Applying the rules announced in these decisions to the facts disclosed in this record, the question arises, is there any testimony, either circumstantial or

otherwise, from which the jury could have reasonably inferred that any of the acts of negligence charged, or all concurring, contributed to the injury and death of Old? If there is, though it be weak, there was no error in refusing to direct a verdict for Plaintiff in Error.

There was no eye witness to the accident which resulted in decedent's death, but all the facts and circumstances tend to show that he fell between the tank car and the refrigerator car complained of while trying to pass from the latter, which was a high car to the former which was a low car, and that this fall was caused by the negligence of the Plaintiff in Error in causing its train to lurch and jerk violently and unusually while the decedent was attempting to make the passage.

In the first place, it is shown by the testimony of the conductor, Harry Eames (R. 51-8) that Old came out of the station at Page just behind the conductor, that he passed the conductor 80 feet south of the front door of the station, with a lighted lantern in his hand going South towards the caboose. The conductor very shortly thereafter discovered him, or a man with a lantern, climbing up on a car 80 feet South of the point where Old passed him, and from the point where he had seen Old go. The train had begun moving slowly forward when Old passed the conductor at the South edge of the platform. He was next seen by the conductor with lantern hanging down by his side, standing on the front end of the second refrigerator

car in the rear end of the tank car complained of, as the train slowly passed going North. The two refrigerator cars immediately behind the tank car were of the same type and height, both S. F. R. D. cars. It was also shown that the immediate duty of Old required him to travel towards the engine from the point where he mounted the train in order to turn up the retainer valves on the top of the cars, and that to discharge this duty, he must necessarily pass from the top of the refrigerator car to the floor of the tank car, which was 6 or 7 feet lower than the top of the refrigerator car. It was shown that there was only one opening in the train from the point where Old was last seen and the pit-fall between the ends of the refrigerator car and the tank car complained of, and that was a space intervening between the ends of the two refrigerator cars immediately behind the tank car; and these two cars being of the same height and the decedent being a large stout and active man, as shown by the testimony, it is not at all reasonable that he should have fallen into this opening between the two refrigerator cars. It was but a short step and the tops of the cars were even. The next opening into which he could have fallen in his passage towards the front end of the train was between the end of the tank car complained of and the refrigerator car immediately behind it.

It is shown by the testimony of C. W. BLACK (R. 75-81) who inspected all the cars of this train from the tank car complained of back to the caboose when

it arrived at Heavener, at the instance of the railroad company, that to make the passage from the top of the refrigerator car to the tank car, the brakeman would have to come down a ladder on the right hand or East side of the refrigerator car that stood out from the body of the car 2 or 2 1-2 inches which was about 4 to 6 inches of the corner of the car, and then throw himself around the corner of the refrigerator car and step diagonally onto the platform of the tank car and catch to the end of the side railing of the outer edge of the tank car, which this witness says lacked 12 or 14 inches coming to the end of the frame of the tank car, but which was afterwards shown by the testimony of R. L. Coleman (R. 200) who had charge of the National Zinc Company cars, and who was familiar with the construction, that the end of this side railing, in fact, lacked 24 inches coming to the end of the frame of the tank car; thus making a distance of about 5 feet from the side ladder on the refrigerator car to the nearest appliance of any kind on the tank car that could be used as a hand hold to catch to while making the passage.

It was shown by a number of witnesses experienced in the train service that to make this passage, the brakeman would have to release his hand hold on the ladder on the refrigerator car before he could secure a hand hold on the end of the side railing of the tank car. It was also shown that he would have to step diagonally around the corner of the refrigerator car towards the center of the tank car and grab to the

ends of the side rail which would necessarily be behind him or to his back; because the two cars being of the same width and the brakeman being on the side ladder on the outside of the refrigerator car, if he were to step straight ahead, he would miss the tank car entirely, therefore to make a safe landing with his feet, he must necessarily step around the corner of the refrigerator car towards the center of the tank car.

It was further shown by the testimony of the witness Black who made the inspection of the cars at Heavener, that there were no ladders on the end of the refrigerator car and nothing on the end of that car at all that the brakeman could use as a hand hold, that there was only one grab iron on the end of that car and that was down near the bottom of the car, and was used by the brakemen in coupling and uncoupling cars. It was further shown by this witness that there were no ladders or grab irons or other appliances on the end of the tank car at all, except one grab iron on the sill below the floor, and the side railing on the outer edge of the tank car, which as heretofore shown, lacked 24 inches coming to the end of the frame of the tank car.

It was also shown by the testimony of Frank Sweeney (R. 103-5), Richard Lee (R. 108-11), W. H. Hopson (R. 112-16), R. Y. Secrest (R. 138-40), that they had been engaged in the train service as brakemen from 10 to 20 years, that they were familiar with the appliances, such as ladders, grab irons, etc., used by railroads operating in this section of the country,

and that from 50 to 75 per cent of box or house cars and a greater per cent of refrigerator cars used by the railroads had both end and side ladders. They further testified that ladders or some other appliances on the ends of tank cars were in common use, and were necessary to enable brakemen to safely pass onto and over such cars. They further testified that in their opinion, it was much safer in passing from the top of a high car to a low car to have end ladders than side ladders, because, as they say, it would be a shorter step, and for the further reason that in making the passage from the end ladder, the foot would press against the body of the car as the step was made, and thereby avoid the danger of slipping, whereas to make the passage from the side ladder, the step would be longer and there would be nothing to keep the foot from slipping back as the step was made.

It was shown by the testimony of A. C. HOLT (R. 82-7), that he was walking along a road paralleling the track and 25 to 30 yards distant as the train was moving out of Page; that shortly after the start it began a violent lurching and jerking to such an extent that he stopped, thinking the train was off the track; that he watched the light on the rear end of the train until it went out of sight around the curve, wondering how far it would go before it flagged the train down; that the jerking was so violent that he thought the train was off the track or had run over some obstruction; that when it passed out of sight he went out on the track to discover, if he could, what caused this

violent jerking and found Leslie Old lying on the track between the rails with both his legs cut off between the knees and feet, with a great hole crushed in his back, and a part of one hand cut off. That he was lying on the track between the rails 95 yards North of the front door of the station, and 18 feet South of where decedent lay, the witness found his lantern lying on the track between the rails with a broken globe lying around it and about 7 feet North of where the lantern lay, he found blood and small pieces of bone on the East rail or the rail next to the depot, and that blood and small pieces of bone were found on and along the East rail from this point to where the body lay. He further testified that there was no blood or bone found anywhere else; that he examined the track carefully clear back to the depot and found none. He further testified that Old lived about an hour and a half and that he was conscious up to within 30 minutes of the time of his death. He knew he was conscious, because he told witness his name, the name of his conductor, also the name of his people and where they lived.

This violent jerking and lurching of the train is further shown in the testimony of O. C. BUSHCOW (R. 91-4), who lived within 85 feet of the track and who, as he says, had retired for the night and was playing with his baby on the bed. He says the train pulled out with an unusual amount of hard jerking, so much so that it attracted his attention and he raised up in bed and listened. A little after the jerking

maybe a minute, he heard the cries of some one as if calling for help. After some investigation he went out to where the cries were and found Leslie Old lying on the track, wounded and mangled in the manner heretofore stated.

R. L. BAILEY (R. 98-100) testified that he was on a car two cars in front of the tank car complained of, lying down on his back as the train pulled out of Page. That after the train started, "It took a jerking spell and then it would check up and start up again." It slipped him about on the lumber when it jerked; that immediately after the last heavy jerk, he heard some one holler, "Oh! Oh!" He could not tell what direction the hollering was, but it seemed to be tolerably close.

It is shown in the testimony of the conductor, HARRY EAMES (R. 58) that the train moved out of Page up grade and that this up grade continued for a distance of two miles.

It was shown by the testimony of the engineer, CLAYTON (R. 217-21) that his engine and air were in good condition and that while he testified there was no lurching or jerking of the train as it went out of Page that night, he further said, "If there was, it could only have been caused by the engineer letting off too much steam." From these facts and circumstances, it is submitted that the jury could reasonably have inferred that when Old mounted the slowly moving train 160 feet South of the station, that he proceeded toward the front end of

the train, to turn up the retainer valves as his duty required him to do, that when he came to this tank car and found there was no end ladder on the car behind it, that he undertook to pass from the refrigerator car to the tank car from the side ladder on the refrigerator car and that as he went to make the step, the lurching and jerking began and because thereof, he was either thrown or fell between the ends of the refrigerator car and the tank car and was killed; that if there had been end ladders on the refrigerator car, or if there had been any appliance on the tank car that he could have grabbed to and had steadied himself, he might have made the passage in safety. That the jerking was violent and unusual is shown by the testimony of all the witnesses who testified on that point, except the train crew. That it was unnecessary and therefore negligent is shown in the fact that the engine and track were in good condition and in the further fact as shown by the testimony of the conductor the train moved out up grade, so that it necessarily took up all the slack the very moment it began to move. The train having gone something more than 100 yards before the jerking began with both engine and track in perfect condition, it is inconceivable that the jerking could have occurred from any other cause than the negligence of the engineer in handling his engine; hence it is not surprising that the engineer, when confronted with all these conditions and circumstances, stated that if there was any jerking it could only have occurred by his letting off too much steam.

There was no other way to answer the question and tell the truth.

That the lurching and jerking of the train was the proximate cause of Old's fall and subsequent death, is shown in the fact that with the last heavy lurch he was heard to cry out "Oh! Oh!" as if calling for help and these cries continued until his body was found on the track 95 yards north of the station.

That he must have fallen between the ends of the tank and refrigerator cars, is further shown in the nature and character of the injuries. It was shown that both his feet were cut off below the knees apparently by the wheels on the east side of the train because there was no blood or bones anywhere else, except on the east rail and it is inconceivable that he could have gotten all his body under the train except his feet unless he had fallen from this side ladder on the refrigerator car or from a similar position, and there being no occasion for him to use a side ladder anywhere else, except at this point, because there were no other tank cars in the train than this, except two next to the caboose, it is reasonable to conclude that he fell between the ends of the two cars complained of. If he had come down the side ladder on the refrigerator car, and attempted to step diagonally around the corner of that car to the platform of the tank car, his body would necessarily be leaning in the direction he stepped, that is inside the track, and if he had fallen while in this position, his body would necessarily have gone down between the ends of the

cars and between the rails and his feet would have been sticking out over the rails, just about the distance the side ladder is from the rail, and inasmuch as the proof shows that that much of his legs were cut off, this circumstance, it is submitted, necessarily tends to show that he fell from this side ladder and no where else. He had no occasion to use any other side ladder in his trip towards the front of the train than the one on the refrigerator car; therefore it is reasonably certain that the decedent must have fallen between the two cars complained of and from the side ladder on the refrigerator car.. However, as we take it, there is no occasion for any controversy as to the place where he must have fallen, or the allegation of negligence as to the failure of the railroad company to equip the ends of its cars with sufficient ladders and grab irons, because under the evidence there is no escape from liability, on the ground of the violent and unnecessary lurching and jerking of the train. This unnecessary jerking is shown by the testimony of four witnesses and with the last heavy lurch some one was heard to cry out in his agony "Oh! Oh!" which, as held by the lower Court, was sufficient to show the causal relation between the jerking and the injury.

It is also shown by the witness Holt, that during this lurching he saw a flash on the railroad track, just about where decedent's lantern was afterwards found. That flash no doubt, came from decedent's lantern which went out the moment it struck the ground. After the train had cleared the track, an investigation

was had and decedent was found lying on the track 95 yards North of the station, run over and mangled by the train. All these facts and circumstances when considered and taken together, lead with reasonable certainty to but one conclusion, and that is, that the violent lurching of the train, which was caused by the negligence of the engineer, was the primary cause of decedent's injury and death. There is no other reasonable theory upon which the facts and circumstances can be explained. And if this be true, then there can be no escape from liability on the ground of the violent and unnecessary lurching of the train. This is true, whatever may be said about the absence of ladders and hand holds on the ends of the cars. That allegation of negligence and the testimony thereon, cannot effect the latter conclusion.

This is a much stronger case on the question of what inference the jury may draw from the facts and circumstances, than the case of Choctaw O & G R. R. Co. vs. McDade, 191 U. S. 64, because in this case we have positive proof of the violent and unnecessary lurching of the train. We also have positive proof that during this lurching a man was heard to cry out in his agony, as if calling for help; we also have positive proof that as soon as the train pulled out decedent was found on the track wounded and mangled by the train, while in the McDade case, the only proof that the negligence complained of was the cause of the injury, was that when last seen, McDade was on top of an extra tall and wide car, signalling

the engineer, and on one side of an overhanging water spout, that a little later he was found 675 yards on the other side of the water spout, with such injuries as might have been caused by coming into collision with the water spout. On that state of facts, this Court held: "While the evidence was circumstantial it was ample, in our opinion, to warrant the submission of the question to the jury under the instructions given."

If there is any evidence from which the jury may draw an inference in the matter, the case ought not to be taken from them.

Schuchardt vs. Allens, 1st Wall. 359.

It was held by this Court, in effect, in Hickman vs. Jones, 9th Wall, 197, that where there is evidence before a jury, whether it is weak or strong, which does so much as tend to prove the issue on the part of either side, it is error for the Court to wrest the case from the consideration of the jury.

It is therefore submitted that the Court did not err in refusing to direct a verdict for the Plaintiff in Error, even if it be held that a request for a directed verdict be sufficient to present a Federal question.

INSTRUCTIONS GIVEN.

In their brief in opposition to the motion to dismiss or affirm, counsel for Plaintiff in Error make no contention that there was error in any of the instructions given except instruction No. 10 on the measure of damages. In the giving of this instruction, it is contended their client was denied a Federal right under the Employer's Liability Act as amended April 5, 1910.

In the outset, we desire to remind the Court, there was none but a general objection to any of the instructions given, for the Court say (R. 415), "No specific objections to the ruling of the Court in giving and refusing prayers for instructions are abstracted. Therefore we will not consider any specific objections now urged by counsel to the rulings of the Court in passing on the instructions." This is in conformity to the practice of that Court.

Files Tebbs, 101 Ark., 207.

Queen of Arkansas Insurance Co. vs. Public School District No. 44, 100 Ark., 328.

As to instruction No. 10 on the measure of damages, it is shown by the record that the only objection urged to the instruction in the Court below is stated as follows: "Counsel say that the Court erred in giving Appellee's prayer for instruction on the measure of damages because it does not state the measure of damages under the Federal law and because it does not separate the amount found for pain and suffering from the amount found for compensation for loss of contributions." As the alleged error in not separating the amount found for pain and suffering from the compensation for the loss of contributions, that point is not before this Court for review, because it is now where assigned as error in this Court and will therefore be treated as abandoned. Exceptions not assigned as error cannot be reviewed by this Court.

Wood vs. Wilbert's Sons Shingle & Lumber Co., 226 U. S., 384.

In their brief in opposition to the motion to dismiss or affirm, counsel for Plaintiff in Error quote three instructions, which they say were requested and refused and which they urge as a specific objection to the instruction on the measure of damages. Counsel have omitted the number of the instructions quoted, but by comparison it will be found that they are Nos. 2 (R. 345) 95 (R. 371) and 96 (R. 371).

Now, by reference to the assignment of error filed by the Plaintiff in Error (R. 418-35) it will be found that the refused instructions or rather the failure of the lower Court to hold that there was error in the refusal of the trial Court to give either of these instructions, is not included in the assignment of errors. Therefore, the refusal to give these instructions cannot be urged as error.

It is further shown by the record that the only alleged errors set forth in the assignment of errors to the ruling of the Court in refusing instructions requested, relate only to instructions Nos. 1, 8, 11, 12, 13, 15, 16, 18 and 88. There is no error alleged in the assignment to the ruling of the Court in refusing to give any instruction requested but those numbered as above, and for that reason Plaintiff in Error cannot now urge as error, or as a specific objection to the instructions given the refusal of the Court to give any requested instructions except those numbered as above stated. Besides, the contention of counsel that an action for pain and suffering could not be combined with

an action for loss of contributions, is wholly untenable and without merit.

The original Act provided for a recovery for the benefit of the widow and children for loss of contributions, and also provided for a recovery for any injury to the employee in case he lived, which suit must be brought by the employee himself. The amendment of 1910 provided for a survival of the employee's right of recovery to his personal representative for the benefit of the widow and children and also provided for but one recovery. If, as counsel say, there can be no recovery except for loss of contributions, there would have been no necessity for the amendment of 1910 providing for a survival of the deceased employee's right of action, because the widow and children had a right under the original Act to recover for the loss of contributions. In making the amendment Congress meant and could only have meant that in case the injured employee died, whatever right of action he had, should survive to his personal representative for the benefit of his widow and children and for the further reason that this amendment provided only for one recovery, it clearly follows that Congress intended that both elements of recovery should be combined in one action, otherwise, Congress might be accused of doing a foolish and senseless thing in making the amendment. The right to recover for both pain and suffering and loss of contributions is recognized by this Court in *Taylor vs. Taylor*, 232 U. S., 363.

NO ERROR IN EXCLUDING ORDERS OF INTER-
STATE COMMERCE COMMISSION, OR IN RE-
FUSING REQUESTED INSTRUCTIONS ON
THAT POINT.

It is further contended that Plaintiff in Error was denied a Federal right or immunity by the State Supreme Court in not holding there was error in the trial Court in excluding the order of the Inter-state Commerce Commission, and also in refusing certain requests for instructions covering that point. These orders, it is said, were promulgated in accordance with the Act of April 14, 1910, and known as the Safety Appliance Act. This contention is made upon the theory that Congress by passing the Safety Appliance Act and by delegating to the Inter-state Commerce Commission the duty of making rules and regulations governing safety appliances, has taken entire charge of the subject of safety appliances and that it is not guilty of any negligence in handling any cars so long as they comply with the regulations of the Commission.

This contention, it is thought, is not tenable for the reason that at the time of the passage of the Safety Appliance Act and of the making of the orders sought to be introduced, it was the common law duty of the carriers to exercise ordinary care to provide their servants with a reasonably safe place in which to work and with reasonably safe appliances with which to do the work and neither Congress, in passing the Safety Appliance Act or its amendment delegating to the

Inter-state Commerce Commission authority to define a standard car, or the orders of the Commission in regard thereto, intended to relieve the carrier of any common law duty it owed to its employees at the time the order was made. This necessarily follows from the rule announced in *Texas & Pac. R. Co. vs. Abilene Cotton Oil Mills*, 204 U. S., 426, to the effect that a statute should not be construed as taking away a common law right which existed at the date of its enactment, unless it be found that the pre-existing right is so repugnant to the statute, that a survival of such right would, in effect, deprive the subsequent statute of its efficiency.

There is no repugnancy between the carrier's common law duty to furnish its employees with a reasonably safe place in which to work and any provisions of the Safety Appliance Act, or any provision of any of the orders made by the Inter-state Commerce Commission. Neither of the orders pretend to deal with the rights and duties of the employee and the carrier as between themselves. The only penalty denounced by the Act for disobedience of the order of the Commission, is a fine of One Hundred Dollars to be recovered by the Government at the instance of the United States District Attorneys and the Inter-state Commerce Commission. No remedy is offered the employee who receives an injury on account of the failure of the carrier to comply with the orders; therefore it is submitted, that the order was not intend-

ed and does not affect his right to a safe place in which to work at all.

In Louisville, etc., Railroad Company vs. Lyon (Ky) 58 S. W. 434, it was in effect held that the mere fact that a statute required the Railroad Commission to designate the place where a flagman should be stationed, will not relieve the railroad company from using proper and efficient means to warn travelers of the approach of trains at undesignated places where the necessity for such protection is shown to be apparent.

An Act of Congress provided for the better security of the lives of passengers on board of vessels propelled by steam, passed in 1838, also provided for certain inspection and made it the duty of the owner of such vessels to cause such inspection to be made and a license was granted only after obtaining the inspection certificate. This system of governmental supervision was further extended by an Act of Congress of 1871, covering in a most careful manner the whole subject, and it was held this legislation was not intended to limit and did not limit the common law liability of the ship-owner as carriers of passengers. Its object was to provide additional safe guards. A failure to comply with the provisions would subject the ship-owner of the steam vessels to its penalties, but the statute neither takes away any common law liability or any common law remedy. It was therefore held, although the owner of the steamboat, when negligence had resulted in injury to a passenger, had

complied with all the requirements of the statute in question, may still be liable for negligence.

Caldwell vs. N. J. Steamboat Co., 47 N. Y.,
292.

Carroll vs. Staten Island R. R. Co., 58 N. Y.,
126, 141.

See also on this subject Fairfax vs. Hunter,
7th Cranch, 603, 629.

As shown in the record (R. 245) the Inter-state Commerce Commission on October 11, 1910, made an order designating the number, dimensions and location of certain safety appliances. As to ladders on house or box cars, the order provided (R. 249) there should be four ladders on each car, located one on each side, not more than eight inches from the right end of car, and one on each end, not more than eight inches from left side of car. The order further provided that the maximum spacing between ladder treads should be 19 inches and that these ladders should extend from the bottom to and on the roof of the car, and that end ladder treads should be spaced to coincide with treads or side ladders, a variation of two inches being allowed.

For ladders and hand holds on tank cars, the order provided (R. 302) there should be four hand holds located horizontally, one near each side of each end of car on face of end sill and that there should also be two tank head hand holds, the latter not required if safety railing runs around the end of tank. (R. 303.)

On March 13, 1911, the Commission made a further order (R. 243) in which an extension of five years from July 1, 1911, was granted to carriers to change and apply certain appliances, including ladders provided for in the order it had made on October 11th before, except that when a car is shopped for work amounting practically to rebuilding the body of the car, it must then be equipped according to the standards prescribed in said order in respect to hand holds, running boards, ladders, etc.

Plaintiff in Error offered both these orders in evidence, but they were excluded. It also requested certain instructions declaring that it was not negligence under the orders of the Interstate Commerce Commission for it to fail to equip its cars with end ladders. It contends, in effect, that the order suspending the first order defining a standard car, for five years from July 1, 1911, relieved it of the duty in placing ladders on the ends of its cars, unless they were shopped for general repairs and that it was therefore not negligence in operating cars without end ladders.

The two orders taken together and they should be so considered, both being offered by Plaintiff in Error, only tend to show that in the opinion of the Commission, end ladders were necessary for the protection of the brakemen in passing from a high car to a low car. The suspension of the original order for five years did not create any new right in the carrier, neither did it relieve the carrier of any duty

that it owed to its employees which existed prior to the making of the first order.

It is therefore submitted that there was no error in excluding from the evidence the orders of the Interstate Commerce Commission above designated.

THE JUDGMENT SHOULD BE AFFIRMED ON NON-FEDERAL GROUNDS.

Although the Court may be of the opinion that the trial Court erred in excluding the orders of the Interstate Commerce Commission from the evidence, and in refusing the request for instruction of Plaintiff in Error along that line, and that it was denied a Federal right or immunity by the State Supreme Court in not holding there was error in these respects, still we submit the judgment should be affirmed on the allegations of negligence as to the violent and unnecessary lurching and jerking of the train. The State Supreme Court found as a fact that this violent lurching was the primary cause of decedent's fall and injury and also that the lurching was caused by the negligence of the engineer in handling his engine and there being ample evidence to sustain that finding, concerning which there can be no Federal question authorizing a review of the question by this Court, it follows that the judgment ought to be affirmed without regard to whether the Court erred in its rulings in excluding the orders of the Interstate Commerce Commission or not. The same may be said in reference to the rulings of the Court in refusing certain requests for instructions to the effect that the

Plaintiff in Error was not required to equip its cars with end ladders and that it was not negligent for its failure to do so. This argument is based upon the theory that where judgment rests upon two grounds, one of which does not involve a Federal question this Court will not consider the Federal question, even though it may have been actually considered and determined adversely to the contention of the Plaintiff in Error in the Court below.

Allen vs. Arguinham, 198 U. S. 148.

Rogers vs. Jones, 214 U. S. 204.

Cal. Powder Works vs. Davis, 151 U. S. 393.

Gaerr-Scott Co. vs. Shannon, 223 U. S. 468.

Hence it follows, that inasmuch as the Court below held the negligence of the railroad company in causing the violent jerking of the train as it was moving out of Page contributed to produce decedent's death and this finding of fact being sustained by the evidence, as already shown, it is wholly unnecessary for the Court to consider the alleged denial of a Federal right in excluding the order of the Interstate Commerce Commission or in refusing the request for instructions, that under said orders the Plaintiff in Error was not required to equip its cars with end ladders, and that it was not actionable negligence to operate its cars equipped as the evidence shows they were, at the time of the injury. This finding is broad enough, and adequate to sustain the judgment, without reference to the absence of end ladders or grab irons, because the Act under which the suit is brought,

provides that the carrier shall be liable for such injury or death "resulting in whole or in part" from the negligence of such carrier.

PETITION AND BOND FOR REMOVAL. NO ERROR IN DENYING THE PETITION.

The provisions in the Employer's Liability Act and Section 28 of the Act of March 3, 1911, which prohibits the removal of causes brought in the State Courts under the Employer's Liability Act to any Court of the United States, is not in conflict with any provisions of the Constitution of the United States.

In *Mondou vs. New York, N. H. & H. R. R. Co.*, 223 U. S., 1, the constitutionality of the Employer's Liability Act was attacked on the ground (among others) that it imposed liability only on Interstate carriers by railroad, although there were other interstate carriers and that because thereof it makes an arbitrary and unreasonable classification and for that reason is violative of the "due process of law" clause of the Fifth Amendment to the Federal Constitution. This Court in passing on the question held: "But it does not follow that this classification is violative of the "due process of law" clause of the Fifth Amendment, even if it be assumed that that clause is equivalent to the "equal protection of the law" clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it deny exertions of that power merely because they occasion some inequalities."

It is true the question of removal was not involved in that case but it is clear to us that if Congress had the right under the Constitution to impose the liability created by the Employer's Liability Act on interstate carriers by railroad only, it likewise had the right to prohibit the removal of suits brought under that Act from the State to the Federal Courts. The one is no more an arbitrary exercise of power than the other and for that reason it is thought, the decision in Mondou case will be controlling in this. Hence, we submit that the Plaintiff in Error was not denied any Federal right or immunity by the lower Court in holding that it was not entitled to remove this cause to the United States Court.

SPECIFIC OBJECTIONS NOW URGED TO THE INSTRUCTION ON THE MEASURE OF DAMAGES, WERE EITHER NOT RAISED IN THE COURT BELOW OR DEALT WITH BY THAT COURT, OR, ARE NOT ASSIGNED AS ERROR IN THIS COURT.

After the copy for the foregoing brief was handed to the printer and partly set up, we received a copy of the brief of the Plaintiff in Error, and while it is impossible at this late date to reply to all of it, we do wish to reply to its criticisms of the instructions on the measure of damages, beginning on page 67 of its brief.

First: The first objection urged to the instruction is, that "it directed the jury to award damages

both on account of pain and suffering of the decedent and of the pecuniary loss of the beneficiaries through the death of the decedent."

This question is not properly before this Court in this case. As heretofore stated, there was none but a general objection to the instructions, at least that is the only exception considered by the State Supreme Court, because, as said by the Court, the Plaintiff in Error "failed to abstract its specific exceptions" and the judges of the Court could not afford to explore the record each for himself to ascertain if the question discussed had been properly raised. The record is not printed in the State Court and the only way the judges have of ascertaining what points are involved in a case, is to require the appellant to prepare and file a printed abstract of so much of the record as is necessary to a full understanding of the questions involved in the case. If the appellant fails to do this, the appeal is either dismissed, or the points discussed are not considered. For these reasons the lower court refused to consider any of the specific objections of the Plaintiff in Error. This, it is submitted, effectually eliminates all the objections to instruction on the measure of damages except those which a general objection will raise.

Plaintiff in Error, however, seeks to extricate itself from this dilemma, on the first proposition, with the contention that it requested instructions to the effect that plaintiff could not recover for both pain and suffering and for loss of contributions to the

widow and child and that this contention was denied by the State Court.

The instructions requested on this subject are numbers 2 (R. 345), 95 (R. 371), 96 (R. 371.)

Now, if it be true that the request for the above instructions is sufficient to specifically raise the question, it cannot avail Plaintiff in Error in this case, for the reason that it has failed to assign the ruling of the Court in refusing either of those instructions in its assignment of errors in this Court. Therefore, its contention on this point cannot be considered by this Court.

Wodd vs. Wilbert Son's Shingle & Lumber Co., 226 U. S. 384.

2. The next criticism of the instruction is that it "did not require the jury to state separately the amounts awarded respectively to the widow and the child of the decedent, nor to state separately the amounts awarded under Section 1 and Section 9 of the Act."

The State Supreme Court did not deal with the first clause of this objection at all. Such a question was never presented to it in any form whatever in the present case, therefore, it did not and was not called upon to pass upon the question. The highest Court of the State having failed to pass on the question, presumably because it was not raised, the question cannot be reviewed by this Court.

Murdock vs. Memphis, 20 Wall, 590.

West vs. Louisiana, 194 U. S., 258.

The latter clause of the objection towit: "Not to state separately the amount awarded under Section 1 and 9 of the Act," while considered and passed upon by the lower Court, is not before this Court for review because the ruling of the State Court in that respect is not assigned as error in the assignments of error filed in this case.

3. The third criticism of the instruction is that it "did not limit the child's right of recovery to its pecuniary loss during the years of its minority and the widow's right of recovery to her pecuniary loss during her expectancy of life."

This question, like the others, was not dealt with by the lower Court, neither was it raised in that Court or in the trial Court unless a general objection to the instruction on the measure of damages is sufficient for that purpose.

This Court, in passing on a similar objection in *McDermott vs. Severe*, 202 U. S. 600, held, (quoting from the syllabus) "a general exception to a charge covering a number of the elements of damages in a negligence suit, does not cover the specific objection that the language of the Court permitting a recovery for the pecuniary loss directly resulting from the injury, would allow the infant plaintiff to recover compensation for his time before as well as after he had reached his majority, although, during infancy, his father is entitled to recover any wages he may earn."

4. It is lastly contended that the "instruction

did not require the jury to limit the damages to such an amount as one of decedent's character and disposition might be expected to contribute to his wife and child." This like the other objections urged to the instruction was not considered by the lower Court. The record falls to disclose that any such objection was offered to the instruction in the Court below and for that reason, it ought not to be considered here. This Court is not one of general appellate jurisdiction over State Courts and its power to review decisions of such Courts is limited to the specific denial of Federal rights and immunities especially set up in the lower Court.

In *St. L. I. M. & S. Ry. Co., vs. Taylor*, 210 U. S. 281, this Court said: "We have not the power to correct mere errors of State Courts although affirmed by the highest State Court. This Court is not a general Court of Appeals with right to review decisions of the State Courts. We may only inquire whether there has been error committed in the decision of those Federal questions which are set forth in Section 709 of the Revised Statutes.

The right or immunity claimed must be especially set up, or it must appear affirmatively from the record that it was actually considered by the Court and ruled against the claimant. If these pre-requisites do not affirmatively appear in the record, the questions will not be considered by this Court.

Farley vs. Towle, 18 Black, 351.

S. Pac. Ry. Co. vs. Carson, 194 U. S., 136.

In our brief on the motion to dismiss or affirm we took the position that the Court below did not deal with these questions, presumably because they were not properly raised, and furnished counsel with a copy of that brief, yet in their brief on the merits, they renew their objections to the instruction without even attempting to show from the record wherein the lower Court dealt with the questions or that they were properly presented to the Court. Their silence in this respect is significant. It can only be explained on the theory that they admit the correctness of our statements as to what the record shows, or does not show.

On page 31 of their brief, counsel for Plaintiff in Error undertook to suggest many ways in which decedent might have come to his death and, as a matter of course, they all exonerate their client from any blame in this respect. This same argument was adduced in *Myers vs. Pittsburg Coal Co.* 233 U. S. 184, but this Court in answering the argument, among other things, said: "This question, however, was submitted to the jury and found against the defendant in the trial Court. Unless the testimony was such that no recovery could be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district Court must be affirmed. That there was ample testimony to carry the question of negligence to the jury, we have already said, and in any case it cannot be said, as a matter of law, that there was no evidence tending to show that Myers came to his death by the negligence of the defendant

in one or more of the ways charged in the petition."

VERDICT NOT EXCESSIVE

It is contended, apparently with much earnestness, that the verdict in this case is excessive; that the amount which was allowed for loss of contributions put out at six per cent interest would yield \$871.00 per annum, which would give "Old's widow and child considerably more than his net earnings and leave them also in possession of the full sum of recovery no matter how long they may have lived."

This same argument was made in *Southern Ry. Co., (Carolina Division) vs. Bennett*, 233 U. S. 80, and this Court, in answering the argument, among other things, said: "It may be admitted that if it were true, that the excess appeared as a matter of law—that is, for instance, the statute fixed a maximum and the verdict exceeded it—the question might arise for this Court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial Court. It does not present a question for re-examination here upon a writ of error. * * * * The premises of the argument for the Plaintiff in Error were not conclusive upon the jury and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge or jury a connivance in escaping the limits of the law."

In conclusion we submit, that of the specifications of error relied on by Plaintiff in Error, those numbered 2 and 3 should be eliminated from consider-

ation, for the reason that the questions involved in them were either not sufficiently raised in the Court below or have not been assigned as error in this Court. This leaves only those numbered one (in sufficiency of the evidence to sustain the verdict) four, (error in excluding orders of Interstate Commerce Commission), and five (error in denying petition for removal), to be considered by this Court and we have endeavored, as best we could, in the foregoing pages to show there was no merit in either of those assignments of error.

It is therefore submitted that if the motion to dismiss the writ of error for lack of jurisdiction is not sustained, then the judgment ought to be affirmed on the merits.

Respectfully submitted,

W. P. FEAZEL,

Counsel for Defendant in Error.

1853

Report of the United States

NAVY DEPARTMENT

OFFICE OF THE SECRETARY

WASHINGTON

1853

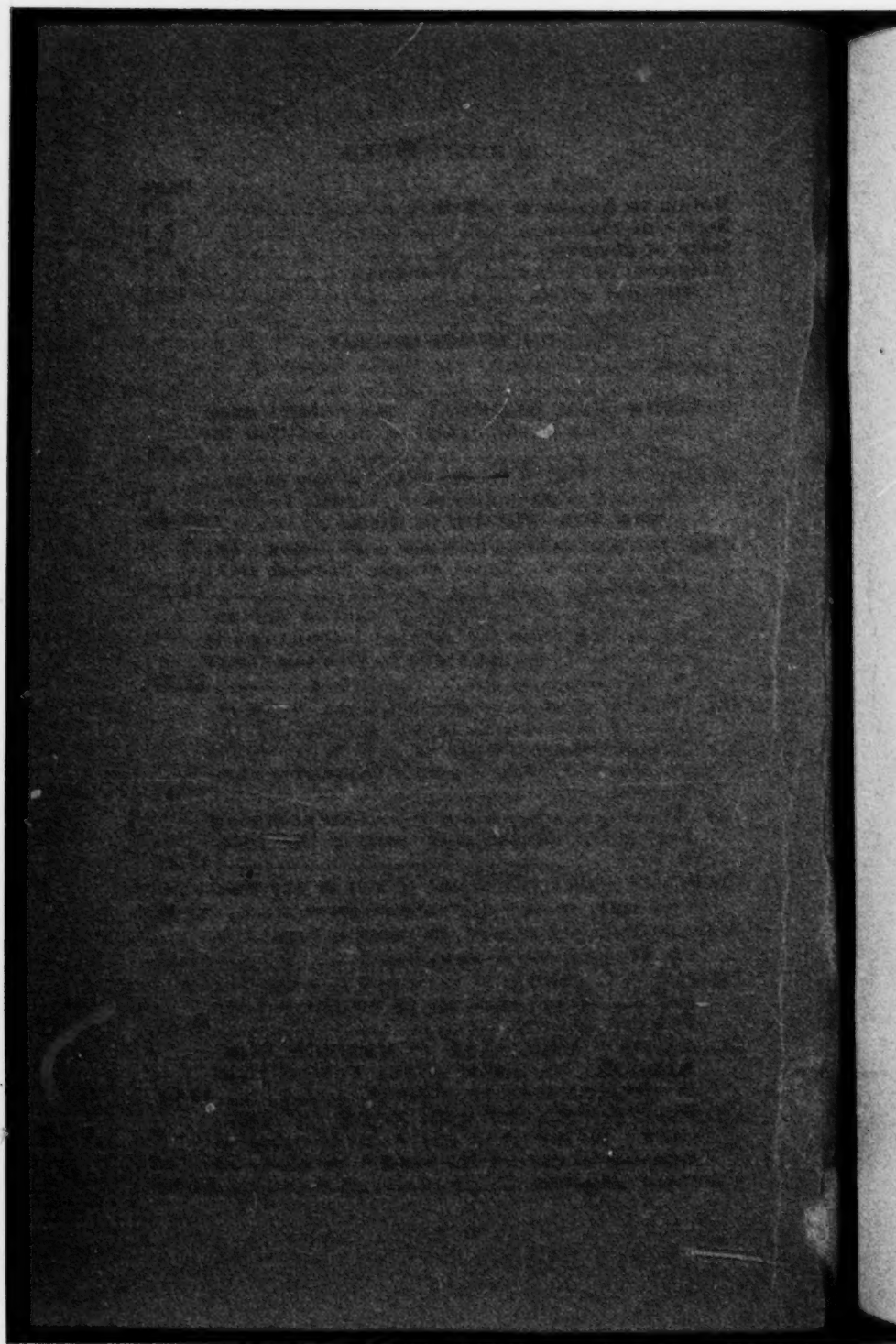
REPORT OF THE SECRETARY

OF THE NAVY DEPARTMENT

TO THE HOUSE OF REPRESENTATIVES

IN RESPONSE TO A RESOLUTION

PASSED MAY 10, 1852



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**IN THE
SUPREME COURT OF THE UNITED STATES**

**KANSAS CITY SOUTHERN RAILWAY
COMPANY-----Plaintiff in Error
vs. No. 538
SAM E. LESLIE, ADMR. SET. OF LESLIE
A. OLD, DECEASED-----Defendant in Error**

ERROR FROM THE ARKANSAS SUPREME COURT

**MOTION TO DISMISS WRIT OF ERROR, OR TO
AFFIRM THE JUDGMENT BELOW**

Now comes the Defendant in Error, Sam E. Leslie, as administrator of the estate of Leslie A. Old, deceased, by his counsel and moves the Court as follows:

I

To dismiss the Writ of Error herein, on the ground that this Court is without jurisdiction of the questions sought to be reviewed by said Writ of Error, for the following reasons:

- (a) That no Federal question was decided by

the State Supreme Court adversely to the Plaintiff in Error. (b) the Federal questions sought to be raised were not raised in the trial court, and under the practice in the Arkansas Supreme Court were not open to review by that Court. (c) The Federal questions sought to be raised are without merit. (d) The decision of the state supreme court is sustainable upon non-Federal grounds. (e) The alleged Federal questions have been foreclosed by previous decisions of this Court.

II

To affirm the judgment of the Supreme Court of the state of Arkansas, which is sought to be reviewed by the writ of error herein, on the ground that the rulings, decision and judgment in said supreme court are obviously correct; that it is manifest that the writ of error was sued out for the purpose of delay only; and that the alleged Federal questions are so frivolous as to not need further argument.

III

That damages in the sum of \$1800.00, being 10 per cent of the judgment herein, be awarded the defendant in error upon the dismissal of said writ of error or the affirmance of said judgment, under rule 23 of this court.

Jan. 18, 1915.

W. P. FEAZEL,

Counsel for Defendant in Error.

IN THE
SUPREME COURT OF THE UNITED STATES

KANSAS CITY SOUTHERN RAILWAY

COMPANY-----Plaintiff in Error

vs.

SAM E. LESLIE, ADMR. EST. LESLIE

A. OLD, DECEASED-----Defendant in Error

To Jas. B. McDonough, Fort Smith, Arkansas,
and S. W. Moore, Esq., and F. H. Moore, Esq., care
of Legal Dept. K. C. S. Ry. Co., in K. C. S. Building,
Kansas City, Mo.

Sirs:

Please take notice that the Defendant in Error
in the above entitled cause, will on the 15th day of
February, 1915, at 12 o'clock, noon, on said day, or
as soon thereafter as counsel can be heard at the Su-
preme Court room, in the City of Washington, District
of Columbia, move this Court on the records herein,
which are printed in one book:

(1) To dismiss the Writ of Error herein on the
ground that this Court is without jurisdiction of the
questions sought to be reviewed by said Writ of Error.

(2) To affirm the judgment of the Supreme Court of the State of Arkansas which is sought to be reviewed by the Writ of Error herein on the ground that the rulings, decision and judgment in the said Supreme Court are obviously correct; that it is manifest that the Writ of Error was sued out for delay only; and that the questions on which the decision of the case depend, are so frivolous as not to need further argument. (3) That damages of \$1800.00 being 10 per cent of the judgment, be awarded the Defendant in error upon the dismissal of said Writ of Error or affirmance of said judgment, under Rule 23 of this Court.

Together with this motion, the Defendant in Error serves upon counsel of record of Plaintiff in Error, a copy of its motion to dismiss or affirm and also a copy of the Defendant in Error's brief to be filed with the Supreme Court in support of said motion. Dated Jan. 18, 1915.

W. P. FEAZEL,
Counsel for Defendant in Error.

STATEMENT OF PLEADINGS

Both the complaint and the answer are rather voluminous and the statements of the pleadings made by the Court, being rather full, we think it sufficient to a full understanding of the case to set forth the statement of the pleadings as made by the Court below, which is as follows:

"This is a suit brought by the Appellee, as the

Administrator of the estate of Leslie A. Old, deceased, for the benefit of the widow and her infant child, under the **FEDERAL EMPLOYERS LIABILITY ACT** and its amendment of April 5, 1910.

"The suit is brought for the loss of contributions to the widow and child by reason of the death of Old and also for the conscious pain and suffering which Old endured before his death, which under the Act survived to the Administrator for the benefit of his widow and child.

"The complaint, after alleging the incorporation of the Appellant, and that it was engaged in Interstate Commerce, and after alleging that Leslie A. Old was in the employment of the Appellant as swing-brakeman, on a train that was being operated at the time, in Interstate Commerce, alleged "That his work required him to look after, and pass over the tops of the cars, composing the middle section of said train; that there were two box cars or refrigerator cars of equal height and immediately in front of these two cars, was an oil tank car; that the floor of this car was 7 or 8 feet lower than the run-way on top of the refrigerator car immediately in its rear; that there were no ladders or grab irons or hand holds on the end of the box or refrigerator car to enable the brakeman to safely get from the top of the box or refrigerator car on to the platform or run-way of the oil car immediately in front of it; except a ladder or grab iron down the side of the refrigerator car some distance from the end thereof; that the absence of

these grab irons, hand holds or ladders down the end of the box car made it unnecessarily hazardous for the brakemen to pass from the top of the box or refrigerator car to the platform or walk-way of the oil or tank car immediately in front of it; that there were no grab irons or hand holds on the end of the oil car, or tank car immediately in front of the refrigerator car, or any other appliances thereon to enable the brakemen in passing from the rear car to the oil car to hold to and steady himself while making the passage.

The complaint further alleged that the engineer of said train was negligent on the occasion of deceased's injury in permitting his air to become out of order, or in carelessly manipulating his air in such a manner that said train was caused to jerk violently and unusually, which jerking contributed to the injury of Plaintiff's deceased, as aforesaid.

There were further allegations in the complaint to the effect that the defendant was negligent in making up said train, in carelessly and negligently placing the oil car or tank car next to the box or refrigerator car, knowing the platform or walk-way on the oil car was some 6 or 7 feet lower than the top of the box or refrigerator car, without providing some means or appliances on both the refrigerator car and the oil car, which would enable brakemen to get from one to the other without any unnecessary danger.

There is an allegation to the effect that the acts of negligence complained of were unknown to the

Plaintiff's deceased and by reason of his inexperience as a brakeman, he was unable to and did not appreciate the danger arising from said acts of negligence. There was a further allegation to the effect that by reason of the absence of such hand-holds or ladders, on the end of said box car, or other appliances, which would have enabled deceased to safely go from the top of said box car to said oil car, concurring with the unusual and violent jerking of the train as it passed out of Page, deceased was unable to get from the top of the box car to the oil car, and while in the effort to do so, and while in the exercise of due care himself, he was thrown between the ends of said cars, and received the injuries which were specifically described.

The complaint concluded with a prayer for damages on account of the pain and suffering in the sum of \$10,000, and for loss of contributionse in the sum of \$15,000, and for a judgment in the total sum of \$25,000. (R 403-405.) (The amended complaint in full may be found on pages 22 to 27 inclusive of the Record.)

Continuing the statement of the pleadings, the Court further said: "The Appellant in due time and form filed a petition and bond for removal of the case to the Federal Court, which was overruled. The Appellant also moved to have the complaint made more definite and certain, which motion was overruled. Appellant then demurred and its demurrer was overruled. Appellant then moved to strike out certain

portions of the complaint, which motion was overruled. Appellant then answered, denying the allegations of the complaint, and setting up the defence of contributory negligence (and assumed risk.) The Appellant then filed a motion for a continuance, which was overruled.

The Appellant duly excepted to the rulings of the Court on its motions and in overruling its demurrer.

STATEMENT OF FACTS MADE BY THE SUPREME COURT

"On the forenoon of March 24, 1913, Leslie A. Old was sent out from DeQueen, Arkansas, as middle brakeman on Appellant's through freight train to Heavener, Oklahoma. Old was called for service on the train about an hour before it left DeQueen. Appellant's road traversed a mountainous country and there were some heavy grades from Mena north. Before descending these grades, it was necessary for the brakemen to go over the tops of the cars and turn up the retainer valves on from 75 to 80 per cent of the loaded cars, in order to assist the engineer down grade and after the descent was made, it was necessary for the brakemen to again go over the tops of the cars and turn the retainer valves down. It was up grade from Mena to Rich Mountain and from Rich Mountain to Page, where the injury occurred, it was down grade. From Page two miles north, it was up grade and then down grade set in.

The train arrived at Page at 8 o'clock at night and stopped there to get orders for its further move-

ments. Old and the head brakeman and the conductor all went in the station house at Page to secure their orders. They then left the station house to take up their duties on the train. The head brakeman came out first with orders to the engineer and proceeded to the front end of the train. Then the conductor came out and walked to the south end of the platform, about 80 feet from the station and stopped. By this time, the train had started slowly forward. Old passed the conductor with his lantern, going south, and a very short time thereafter, the conductor saw some man with a lantern climb up on the train about 80 feet south of him and from the point where he saw Old going. As the train moved slowly along, the man with the lantern on top of the train going north, passed the conductor. The car that the man was on was the second car in the rear of the tank car. As the train moved on, there was a violent and unusual jerking of the cars, two being especially noticeable. Just after the last heavy jerk, some one was heard to cry out "Oh! Oh!" as if calling for help. After the train passed out, the witness whose attention was attracted by the unusual jerking of the train, went out on the track to discover what was the cause of the jerking, and 95 yards north of the freight door of the station, he found Leslie Old lying on the track between the rails with both legs cut off between the knees and feet, one shoulder crushed and mangled, part of the left hand crushed off, and the skin knocked off his head. Some 15 or 18 feet south of where he lay, his

lantern was found lying on the track between the rails with the broken glass lying around it. About 7 feet north of the lantern blood and small pieces of bone were found on the rail nearest the depot and pieces of bone and blood were also found between this point and where deceased lay. There were no signs of blood or bone anywhere else.

The two cars immediately in the rear of the tank car complained of were S. F. R. D. cars of the same type and height. The tank car was a large iron tank, set upon the frame in the nature of a flat car, and that part of the floor of this car between the tank and the outer edge was the only walk-way or passage-way over this tank car. The tank car had side railings on the outer edges of the side of the car, which lacked 24 inches coming to the end of the frame of the car. The only appliances furnished the brakemen to pass from the top of the S. F. R. D. car to the tank car, was a side ladder on the end thereof. One had to step from this side ladder on to the end of the tank car and grab to the end of the side rail on said car. From the side ladder to the nearest end of the side rail was about 5 feet. There was no ladder on the S. F. R. D. car and no ~~grab irons~~ ^{hook} on the end of that car, except down near the end of the car, which was used by the brakemen in coupling and uncoupling cars. There were no end ladders or grab irons on the tank car at all, except on the sill below the floor. There was nothing on the end of the tank car for brakemen to hold to while making the passage except the end of

the side railing. It was necessary for the brakemen in passing from the side ladder on the S. F. R. D. car to the tank car, while the train was in motion, to release his hold on the former before he was able to secure a hand hold on the railing of the tank car.

It was shown that the train would have to go one-fourth to one-half a mile before it could get under headway.

The Appellant excepted to the rulings of the Court in admitting and excluding testimony.

The Appellant presented 97 prayers for instruction. Of these the Court refused all but 7. The Court granted 10 prayers for instruction on behalf of Appellee and gave 8 instructions on its own motion. The Appellant excepted to the rulings of the Court in refusing its prayers for instruction and also excepted to the rulings of the Court in granting the prayers of Appellee for instructions, and to the giving of the instructions by the Court on its own motion.

The jury returned a verdict in favor of the Appellee for \$25,000. The Court caused a remitter to be entered in the sum of \$7,000, and overruled Appellant's motion for a new trial and entered judgment in favor of Appellee for the sum of \$18,000, from which this appeal has been duly prosecuted. Other facts are stated in the opinion."

(R. 405 to 407.)

INSTRUCTIONS GIVEN.

On motion of the defendant in error, the Court gave the following instructions:

No. 1. You are instructed that the uncontradicted testimony in this case shows that at the time of his injury, plaintiff's deceased was engaged by the defendant on an inter-state train as a brakeman on said train and was engaged in inter-state commerce. In such cases, the law provides among other things, that every common carrier by railroad, while engaged in inter-state commerce, shall be liable in damages to every person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his personal representative for the benefit of the surviving widow or children of such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, etc. Therefore, if you find from a preponderance of the evidence that deceased's injury and death was caused in whole or in part by the negligence of the defendant, or any of its employees, as set out in the complaint, you will find for the plaintiff, unless you further find the defendant assumed the risk or was guilty of such contributory negligence as will bar a recovery as hereinafter explained.

No. 2. You are instructed that it was the duty of the defendant to inspect all the cars put into this train before the train was started on its trip and it was the duty of the inspector to see that the cars put into the train were properly equipped with such

safety appliances as you may find from the evidence were in common use by the railroads in this section of the country and necessary to prevent exposing the brakemen to unusual and unnecessary hazards in going from car to car while the train was in motion. If you find from the evidence that the grab irons, hand holds or ladders on the ends of the freight cars for the use of the brakemen going fro car to car while the train was in motion in the discharge of their duties, were commonly and generally used by the railroads in this section of the country, and that the same are necessary to enable the brakemen to go from car to car while the train is in motion, in the discharge of their duty, without unusual and unnecessary hazards, and that the defendant permitted a car without adequate equipment of such grab irons or ladders to be put in its train and that the injury and death of the plaintiff's deceased was caused in whole or in part from the lack of such equipment, then the defendant is liable in this case, unless the deceased assumed the risk thereof or was guilty of such contributory negligence as will bar a recovery as hereinafter explained.

No. 2½. Negligence is the doing of something which a man of ordinary prudence would not do, or the failure to do something which a man of ordinary prudence would do, under similar circumstances.

No. 3. If you find from a preponderance of the evidence that the decedent was injured in attempting to pass from the refrigerator car on to and over the tank car, as set out in the complaint, and if you fur-

ther find that in making up said train, a person of ordinary caution and prudence in the exercise of ordinary care, would have placed cars on either end of said oil or tank car, equipped with such appliances as would have materially lessened the hazards or dangers in passing onto and over said tank car, and that defendant in the exercise of ordinary care, could have done so, and negligently failed to do so, and that such failure in whole or in part was the cause of decedent's injury and death, then you will find for the plaintiff, unless you further find that decedent assumed the risk of said danger or was guilty of such contributory negligence as will bar a recovery as hereinbefore defined.

No. 4. If you find from a preponderance of the evidence that the employees of the defendant company in charge of the defendant's train at the time of decedent's injury, carelessly and needlessly permitted the train to jerk or lurch violently, unusually and unnecessarily hard, while said train was passing out of Page, and that this jerking and lurching could have been prevented by the exercise of ordinary care on the part of said employees and if you further find that said jerking and lurching was the cause, either in whole or in part of the deceased's injury and death, then you will find for the plaintiff.

No. 5. If you find from a preponderance of the evidence that decedent received his injury and death on account of the negligence of the defendant in either of the respects set forth in the preceding instructions,

if you find there was negligence of the defendant in either of the respects set forth, or a concurrence of the alleged acts of negligence, then the defendant is liable, unless decedent assumed the risk or was guilty of such contributory negligence as will defeat a recovery as hereinafter defined.

No. 6. While an employe assumes all the risks ordinarily incident to his work, yet he does not assume the risk of negligence on the part of the employer or the employee's other servants. If the employer or its other servants negligently failed to perform their duties to an employee, then their negligence in such respect, is not a risk assumed by the employee unless he continues in such employment with the full knowledge of such negligence and the dangers arising therefrom.

No. 7. You are further instructed that if you find from the evidence that the decedent himself was guilty of any negligence which contributed to his injury and death, provided you find the defendant liable, such negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to the decedent.

No. 8. In determining whether the decedent was guilty of contributory negligence, you must determine whether, under all the circumstances presented to him at the time, he acted as a man of ordinary prudence and care would have acted. If the act of the defendant in going from one car to another while the train was in motion was dangerous, and the danger was known and

appreciated by him, and is one of which many men are in the habit of assuming, and prudent men are earning a living at work exposing them to these risks, then one who assumes the risks cannot be said to be guilty of contributory negligence, if having in view the risks assumed, he uses care reasonably commensurate with the risks to avoid injurious consequences.

No. 9. You are instructed that it devolves upon the plaintiff to establish not only the negligence complained of, but that such negligence was the cause of the injury. This causal connection must be established by evidence as a fact, and not be left to mere speculation and conjecture. This rule, does not, however, require that there must be direct proof of the fact itself, but it may be established by circumstantial evidence, that is by such facts and circumstances of such a nature and such connection and relation to each other, that the conclusion therefrom may be fairly and reasonably inferred.

No. 10. If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering, if any, the deceased underwent from the time of his injury until his death, and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from deceased's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, ex-

pectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time, and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of deceased should be deducted and the remainder reduced to its present value, should be the amount of the contributions for which plaintiff is entitled to recover, if your verdict should be for the plaintiff. (R. 372-4.)

The court, on its own motion, gave the following instructions:

No. 1. In the outset, you are instructed that the burden of proof is upon the plaintiff to prove the manner and cause of the death sued for, and that it resulted proximately, that is directly from one or more of the alleged acts of negligence in the complaint. If from the evidence it appears equally that it may have or may not have been caused as alleged in the complaint then it is not necessary to go further, plaintiff in that event could not recover and you should find for the defendant.

No. 2. If the jury should find that the death of deceased resulted from an unavoidable accident or from his own negligence alone, or occurred from the negligence of the defendant other than the negligence alleged in the complaint, then the plaintiff would not be entitled to recover and your verdict should be for the defendant.

No. 3. You are instructed that negligence cannot be inferred from the mere happening of an accident,

and if the circumstances relied upon by the plaintiff to show negligence in this case, are consistent with ordinary care on the part of the defendant, then the charge of negligence will fail for want of proof, and in that case you will find for the defendant.

No. 4. You are instructed that the mere fact that the deceased was killed at the time and place alleged in plaintiff's complaint, does not warrant a recovery and in order for plaintiff to recover, he must go further and show by a preponderance of the evidence that said defendant company was not only guilty of the negligence alleged in the complaint, but that said negligence proximately contributed to the death of the plaintiff's intestate, but if the evidence fails to show this, then it is your duty to find for the defendant.

No. 5. If the evidence in this case fails to establish to your satisfaction the negligent manner in which deceased was killed, as alleged in the complaint, then the court tells you as a matter of law, that you cannot presume negligence on the part of the defendant company, and that it would be your duty to return a verdict for the defendant.

No. 6. The deceased Old in accepting and continuing in the employment for which he was engaged as brakeman, assumed all the ordinary and usual risks and perils incident thereto; he assumed all the obvious risks of the work in which he was engaged, and also the risks he knew existed as well as those

which by the exercise of ordinary care, he might have known existed.

No. 7. By his contract of service with the defendant, he agreed to bear the risks of all such dangers, and if his death resulted proximately from any one of such dangers, plaintiff cannot recover in this action.

No. 8. It is the law, that where an employee knows the methods that are adopted in doing the work for which he is engaged and the place furnished in which the work is to be done and knows and appreciates the dangers thereof, if any, and accepts and continued in the employment under such conditions, although they may involve greater danger than would other conditions and places for work, he assumes the risks of the dangers that may result therefrom, and there can be no recovery for the death or injury thereby occasioned. (R. 372-3.)

On motion of the plaintiff in error, the court gave the following instructions:

No. 27. The court instructs the jury that if said train had defects in its air brake appliances, which defects occurred just before the arrival of the train at Page, and if said defects in the exercise of ordinary care could not have been known or if known to the employees in charge of said train, could not have been repaired, then the existence of said defects would not be evidence of negligence and a recovery could not be based on the same in this action. (R. 355.)

No. 42. It is further alleged in said complaint that it was the duty of the defendant to have the ends

of the tank car and the refrigerator car equipped with hand holds, ladders or grab irons, on the end thereof, and to have such hand holds, ladders or grab irons on the end of said cars as would enable the brakemen safely to go from one car to another in the discharge of his duty. The court instructs the jury that this allegation does not authorize a recovery, if the plaintiff means thereby to claim a recovery on the ground that the defendant is an insurer of the safety of said cars and of the deceased. The defendant is not an insurer of the employees, nor does it insure that the brakemen may not be injured in the discharge of their duty. The law does not require the defendant to be an insurer. Under the law, the defendant is required only to use ordinary care to select cars that are reasonably safe and to select air brake appliances that are in reasonably good condition. It is not required to insure that any hand holds or any car may be out of repair, nor does it insure that brake appliances may not get out of repair.

No. 43. If the defendant exercised ordinary care in the inspection of said cars and in use and handling of same, the plaintiff is not entitled to recover even though the jury should find that the deceased came to his death by reason of insufficient hand holds, grab irons or ladders or by reason of insufficient or defective air brake appliances. (R. 359.)

No. 54. The deceased, Leslie Old, in accepting and continuing in the employment for which he was engaged as brakeman, assumed all the ordinary and

usual risks and perils incident thereto; he assumed all of the obvious risks of the work in which he was engaged and also the risks he knew existed as well as those which by the exercise of reasonable care he might have known existed. By his contract of service with the defendant, he agreed to bear the risks of all such dangers and if his death resulted from any of such dangers, plaintiff cannot recover. (R. 362.)

No. 57. If the evidence in this case fails to establish to your satisfaction the negligent manner in which the deceased was killed, as alleged in the complaint, the court tells you as a matter of law, that you cannot presume negligence on the part of the defendant company, and that it would be your duty to return a verdict for the defendant. (R. 363.)

No. 94. The court instructs the jury that the defendant in this case alleged that the injury to the deceased was due to the risk which the deceased assumed, and that it was not due to any negligence of the defendant. If the deceased voluntarily worked with the National Zinc car, No. 17 and said S. F. R. D. car No. 6239 having worked with the same during the day and afternoon, and if he realized their dangers, then he assumed the risk due to such dangers if they existed and having done this, if he did, he cannot recover. In other words, if the deceased, with knowledge of the kind of cars he was required to use, and with knowledge of the kind of ladders on said cars, and with knowledge of the condition of the air brake appliances and understood and appreciated the dan-

gers thereof, if any, worked on the same and with the same and was injured by reason of those conditions, then he assumed the risk and the plaintiff cannot recover in this action. (R. 370.)

The assignments of error are so voluminous that we cannot re-produce them here, but they are all predicted upon a right or immunity which plaintiff in error claims was granted to it by the act of congress approved March 3rd, 1908 as emended by the act of April 5th, 1910, commonly known as the Employers Liability Act. These assignments begin on page 418 of the record and end on page 435.

BRIEF ON MOTION.

The authority of this court to review the decisions of the highest court of a state being limited by section 237 of an act approved March 3, 1911, commonly known as the "Judicial Code," it is thought not inappropriate to re-produce that section, which is as follows:

"A final judgment or decree in any suit in the highest court of the state, in which the decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or the authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of the statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of their validity; or where any title, right, privilege or immunity

is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the supreme court upon writ of error."

With the provisions of this act as our guide, we will now proceed to notice the many assignments of error on behalf of the plaintiff in error, in the order in which it has seen fit to state them and endeavor to show wherein none of the alleged errors come within the provisions of the act above quoted, or if they do, they have been foreclosed by the prior decisions of this court, or are wholly devoid of merit.

I

PETITION FOR REMOVAL.

NO FEDERAL QUESTION ARISES IN THE DENIAL OF THE PETITION FOR REMOVAL.

The first assignment of error challenges the correctness of the lower court's decision in holding that the plaintiff in error was not entitled to remove this cause from the state to the Federal court. This alleged right to remove the cause is claimed under an act of congress, approved March 3, 1911, and presumably section 28 thereof.

This suit, it will be remembered, is brought under

the Federal employment's liability act and its amendment of April 5, 1910.

It is provided in section 28 of the act of March 3, 1911, the very section that plaintiff in error must necessarily rely on for its right to remove, "That no cases arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto and brought in any state court of competent jurisdiction, shall be removed to any court of the United States."

Thus it will be seen that the very law upon which plaintiff in error relies or must rely, in order to assert its right of removal, prohibits the removal in this class of cases.

Hence, it follows that the claim of right to remove the case under the Federal statute is wholly without merit, because that act not only does not authorize the removal, but actually prohibits it.

Plaintiff in error however, seeks to avoid the provision of this act with the further claim that the act is unconstitutional, that it is in conflict with the fifth amendment of the constitution of the United States. This contention, it is thought, is also untenable. The matter of removal of causes from the state to the federal court, is not a constitutional right, but depends solely upon the action of congress. The constitution declares the lines in which congress may confer jurisdiction, but congress may define and prescribe to what

extent the judicial power is to be exercised by the Federal courts.

McIntyre vs. Wood, 7 Cranch, 504.

Kendall vs. U. S., 12 Peters, 524.

Cary vs. Curtis, 3 How., 236.

This court has repeatedly held that the right of removal to the Federal court depended upon congressional action and that it does not exist in any case in the absence of an act of Congress conferring the right.

Houston vs. Moore, 5th Wheat 1.

Gaines vs. Fuentler, 92 U. S., 10.

Insurance Co. vs. Pechner, 95 U. S., 185.

That Congress may restrict the right of removal to certain classes or to causes involving certain amounts without running counter to any of the provisions of the constitution, has been decided by this court and is no longer open to discussion.

Sheldon vs. Sill, 8th How., 441.

It, therefore, necessarily follows that the plaintiff in error was not denied any Federal right in the denial of its petition for removal.

II

DIRECTED VERDICT.

NO DENIAL OF ANY FEDERAL RIGHT OR IMMUNITY IN THE REFUSAL TO DIRECT A VERDICT FOR PLAINTIFF IN ERROR.

In the second assignment of error, it is claimed plaintiff in error was denied "A right or immunity

granted to it by a proper construction and application of the act of congress, approved April 22, 1908, commonly known as the employer's Liability Act, including the amendment approved April 5, 1911, in that the state supreme court held there was no error in the trial court's refusal to direct a verdict in its favor.

It is no doubt intended by this assignment to question the sufficiency of the evidence to sustain the verdict. If we are correct in this inference, then it is further submitted that the contention cannot be sustained, except on the theory that there is absolutely no evidence either circumstantial or otherwise, from which the jury could have inferred negligence on the part of the said railroad company and the causal connection between that negligence and the alleged injury.

It is proper to direct a verdict only when adopting the view of the evidence most favorable to the party against whom the verdict is requested, it affords not even a shadow of ground for concluding that the injury suffered was caused by the negligence complained of.

Anderson vs. Smith, 226 U. S., 439.

Myers vs. Pittsburg Coal Co., 231 U. S., 756.

In addition to the rule announced in these decisions, there is another often announced and repeated by this court to the effect that the findings of fact by the jury in a suit at law or by the highest court of a state, are conclusive on the supreme court of the United States in cases coming from state courts.

Chrisman vs. Miller, 197 U. S., 313.

Clipper Mining Co. vs. Ell Mining & Land Co., 194 U. S., 220.

King vs. West Va., 216 U. S., 101.

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 97.

It seems to be well settled by numerous decisions of this court that in actions at law, at least, the supreme Court of the United States has no jurisdiction to review the decisions of the highest court of a state upon questions of fact, although a Federal question would or would not be presented according to the way in which the questions of fact were decided.

Herrick vs. Atchinson etc. R. R. Co., 167 U. S. 673.

Chicago, B. & Q. R. R. Co., vs. Chicago, 166 U. S. 226.

It has further been held by this Court that the verdict of a jury settles questions of fact on a writ of error from the United States Supreme Court to the highest court of a state.

Smiley vs. Kansas, 196 U. S. 447.

Findings of fact by which it was determined that certain transactions were invalid under the Federal Bankruptcy Act, were held conclusive upon the Federal Supreme Court.

Eaularre National Bank vs. Jackson, 204 U. S. 522.

Chapman & Dewey Land Co. vs. Bigelow, 206 U. S. 41.

Assuming that the Court will adopt this view

and pass on the motion in the light of the facts as found by the State Supreme Court, we will not refer especially to the facts as shown by the testimony of the witnesses, but will rest the question alone on the facts as stated by the lower Court.

In addition to the facts already set forth in another part of this brief, as being made by the lower court, the Court in its opinion after citing some authorities and applying them, further found: "Applying these principles to the facts in hand, we are of the opinion that the jury were warranted in finding that the death of Old resulted through the negligence of the Appellant in causing the violent jerking of the train, which, concurring with its negligence also in not equipping its cars with necessary ladders, grab irons or hand holds on the end thereof in order to enable Old to pass from the S. F. R. D. car to the tank car, caused him to fall between said cars and produced his death.

The jury were warranted in finding that when Old came out of the station at Page, with his orders. he proceeded with his lantern in hand to mount the cars where his duty called him; that he was passing from the top of the refrigerator car to the tank car, and on account of the same not having been provided with any grab irons or hand holds, in attempting to make the passage as the cars lurched forward, he was thrown between them; that if the cars had been provided with the necessary grab irons, he might have saved himself notwithstanding the sudden jerk-

ing and lurching of the cars, by holding on to these grab irons. It was shown there was only one opening in the train between where Old (or the man whom the jury might have found to be Old) was last seen, and the end of the cars where the jury could have found and must have found Old fell. The intervening space before he came to the space through which he must have fallen, was between two refrigerator cars of the same height and it required only a short step to make this passage. Old being a large man, stout and active, it was not at all probable that he would have fallen between the two refrigerator cars. The character and nature of the wounds that Old received, and the position in which his body was found, warranted the jury in finding that the only opening through which Old could have fallen, was between the refrigerator car and the tank car. It was shown that to make the passage between the refrigerator car and the tank car, the brakeman would have to come down the ladder on the right hand side of the refrigerator car. This ladder stood out from the body of the car two or two and one-half inches and was about four to six inches from the corner of the car. To get on the tank car from this side ladder, the brakeman would have to throw himself around the corner of the refrigerator car and step diagonally across on the platform of the tank car and catch to the side railing on the outer edge of the tank car. This side railing of the tank car was 24 inches from the end of the tank car, making a distance of five feet

from the side ladder or hand hold on the refrigerator car to the nearest appliance on the tank car that the brakemen could use as a hand hold. In making the passage he would have to release his hand hold on the refrigerator car, in order to secure a hand hold on the side railing of the tank car. He could only pass from the refrigerator car to the tank car by stepping around the corner of the refrigerator car, diagonally towards the center of the tank car. The position that his body was in, the manner in which his legs were injured, the fact that his legs were cut off by the wheels between the feet and the knees, and the fact that his feet must have been on the outside of the East rail, about the distance of the side ladder from the rail, and that blood and small pieces of bone were found on the East rail and no where else, all tended to prove and warranted the jury in finding that Old fell from the train while attempting to make the passage from the refrigerator car to the tank car in the manner indicated, and that if the cars had been provided with the necessary grab irons or hand holds on the ends, that he might have made the passage and protected himself against the danger, notwithstanding the violent lurching and jerking of the train. The fact that immediately after this last jerking of the train, some one was heard to cry out "Oh! Oh!" and that the body of Old was soon thereafter discovered, tends to show the casual connection between the lurching of the train and his death.

We are of the opinion that it was a question for

the jury, under the circumstances developed in evidence, as to whether or not the death of Old was caused by the negligence of Appellant as alleged in the complaint."

(R. 412-13.)

These conclusions of fact as made by the Court, are abundantly supported by the evidence of witnesses, as will be seen by reference to the testimony of G. W. Black on the question of the absence of ladders or hand holds on the end of the cars or lack of appliances. ((R. 77-79.)

For the testimony relating to the violent jerking of the train and the nature and character of decedent's injuries, his position on the track with blood and small pieces of bone and their location, the location of his lantern, the Court is referred to the testimony of A. C. Holt (R. 83-7) also the testimony of O. C. Buschow (R. 91-3), the testimony of R. L. Balley (R. 98-100.)

If it be true as announced by the authorities cited above that this Court will accept the findings of fact as made by the lower Court as conclusive, then it necessarily follows from the statement of facts above set forth, that the Plaintiff in Error has not been denied any right or immunity granted it by the Employer's Liability Act or its Amendment, by the State Supreme Court, in its ruling that there was no error in refusing to direct a verdict in its favor. The facts as found by the Court, and as shown by the evidence, clearly make out a case of negligence for the jury,

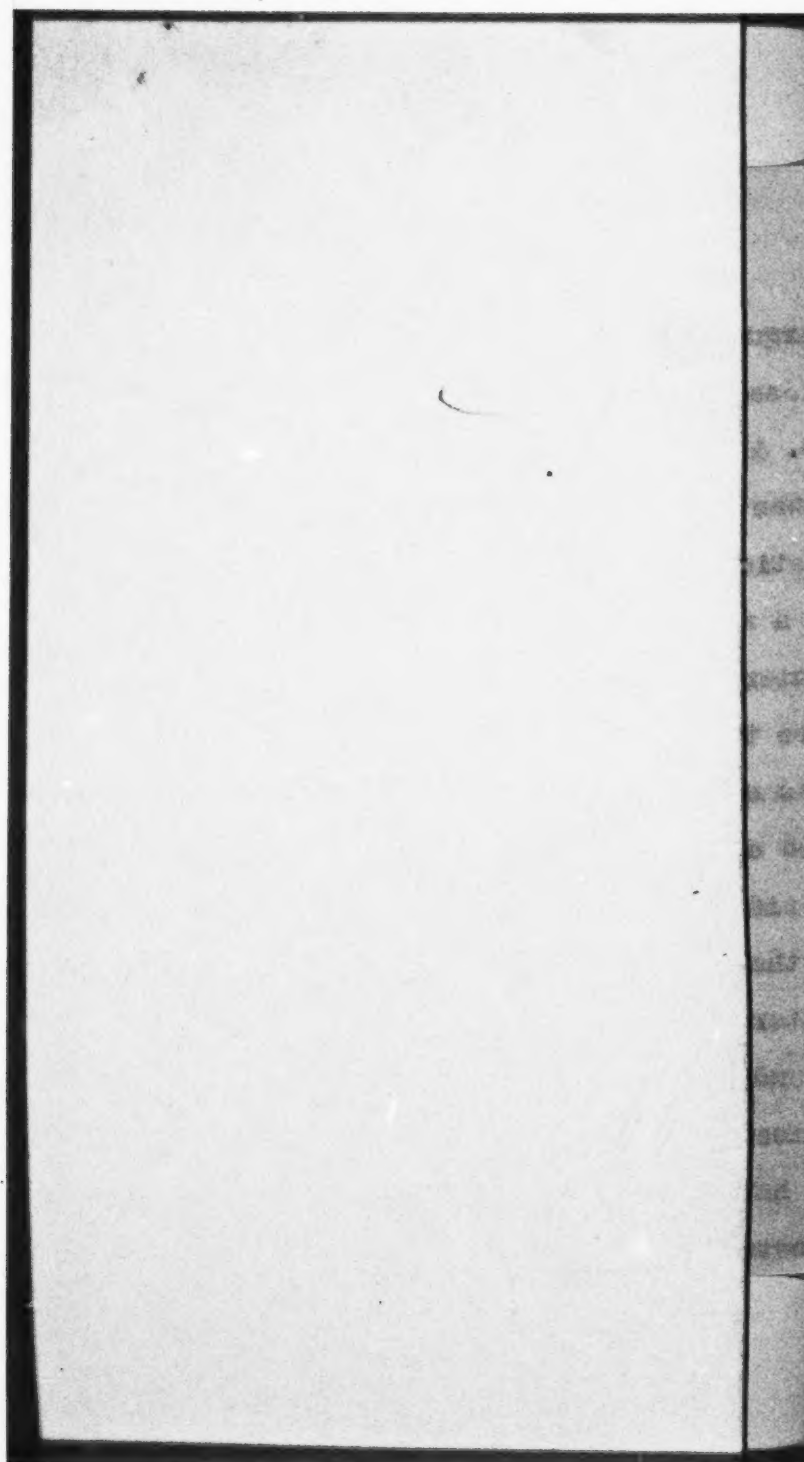
especially on the allegations of the violent and unnecessary lurching of the train. The casual connection between that allegation of negligence and the alleged injury is abundantly shown in the fact that some one was heard to cry out, "Oh! Oh!", with the last heavy lurch of the train, and immediately after it had cleared the track, Old's body was found on the track 94 yards north of the station with his legs cut off by the East wheels of that very train, his lantern with a broken globe around it lying on the track between the rails, eighteen feet south of where his body lay, and blood and small pieces of bone scattered along the East rail from a point seven feet North of the lantern to where Old lay.

+ These facts, which are undisputed, were sufficient to warrant the jury in finding that Old fell and received his injuries in consequence of the violent lurching of the train.

That this lurching was unnecessary and therefore negligent, is shown in the testimony of the engineer in charge of the train, who, while denying that any jerking of the train occurred, further said that if it did occur, it must have been on account of the engineer letting off too much steam. This testimony, it strikes us, can lead to no other conclusion but that Old's death was caused by the violent and unusual jerking of the train. It was purely a question of fact passed upon by the jury and affirmed by the highest Court of the State and according to the uniform rule of this Court, as we understand its decisions, the ver-

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Further argument on this question, it is thought, is foreclosed by the decision of this Court in *Chestnut O. & C. Ry Co., vs McCabe* 191 U. S. 64, where it was said, (quoting from syllabus)

" The question whether a railroad brakeman was killed as a result of a collision with an overhanging water-spout on a water tank is for the jury, where there was evidence that when last seen he was signalling the engineer from his post on the car which was of more than average height and width, where he would be likely to be struck by the spout in passing, and that shortly thereafter he was missed from the train, his lantern found on the car and his body discovered about 675 feet beyond the tank, with injuries that might have been produced by a collision with the obstruction."



dict of a jury on a question of fact or the findings of fact by the highest Court of a state, is conclusive upon this Court and we therefore submit that that question is no longer open to discussion in this Court.

III

REQUESTED INSTRUCTIONS REFUSED.

(a) THERE WAS NO DENIAL OF ANY FEDERAL RIGHT IN REFUSING THESE INSTRUCTIONS.

In its fourth, sixth, seventh, eighth, ninth, tenth and eleventh assignments of error, the plaintiff in error claims that it was denied an immunity granted to it under the Federal Employer's Liability Act in the refusal of the lower court to hold that the trial court committed error in refusing to give the eighth, eleventh, twelfth, thirteenth, fifteenth, sixteenth and eighty-eighth instruction requested by it.

The eighth, eleventh and twelfth requests were properly refused because they advised the jury what weight to give to certain testimony or what testimony was sufficient or insufficient, and therefore they were an invasion of the province of the jury. Section 23, Art. 7, constitution of Arkansas, 1874, especially declares that a judge shall not charge juries in regard to facts.

All the judge had a right to say to the jury on the questions of fact, recited in these instructions, was that they might be considered in connection with all the other evidence in determining whether or not the

railroad company was guilty of the negligence charged. The trial court had no right to tell the jury what evidence was or was not sufficient to show negligence.

Duckworth vs. State, 83 Ark. 194.

Blankinship vs. State, 55 Ark., 246.

The thirteenth, fifteenth, sixteenth and eighty-eighth requests of the Plaintiff in Error, were to the effect that under the act of Congress of April 14, 1910, as amended on March 4, 1911, and June 30, 1912, and under the regulations of the Interstate Commerce Commission, duly adopted and based upon said acts of Congress, the defendant had a right to accept and transport refrigerator car S. F. R. D. No. 6239 and National Zinc Company tank car No. 17, with the hand holds, grab irons and ladders thereon as described in the evidence, and it was not negligence for the defendant to receive and transport said cars without any hand holds, or without other hand holds than those shown to be thereon by the testimony, and the plaintiff in this case is not entitled to recover upon the allegation that said cars did not have hand holds, grab irons or ladders on the ends of said cars, and no recovery can be had upon that allegation.

This is substantially the substance of all the instructions requested by the plaintiff in error on the absence of end ladders on the two cars complained of.

As shown by the record, the court below it seems, did not pass upon these instructions at all; the only

reference to the refused instructions noted in the opinion being as follows:

"Only a few of the prayers for instructions on the part of the appellant, which the court refused are set forth in the abstract, and appellant does not urge, in brief of counsel, and specific objection to the refused prayers which it sets out." (R. 415.)

From the foregoing extract from the opinion, it clearly appears that the court did not pass on the requested instructions and quite likely for the reason that they were not urged in brief or counsel and therefore treated by the court as abandoned or waived. This is in accordance with the rules of practice in the Arkansas Supreme Court.

Purifoy vs. Lester Mill Co., 99 Ark., 490.

Reed vs. State, 103 Ark., 391.

This court in Hubbert vs. City of Chicago, 202 U. S., 275, announced the rule (quoting from the syllabus):

"That Federal questions which the highest court of the state is by its settled practice justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel will not serve as a basis for a writ of error from the supreme court of the United States."

See also Seaboard Air Line Railroad Co. vs.

DuVal, 225 U. S., 477.

In Cox vs. Texas, 202 U. S., 446, it was again held, (quoting from the syllabus): "A Federal question although referred to in the assignment of error in the

state appellate court and in the supreme court of the United States, cannot be considered by the latter court on writ of error to the state court, where it does not appear that the state court dealt with the question, and it may have refused to do so, on the ground that it was not raised in the trial court."

See also *Erie Railroad Co. vs. Purdy*, 185 U. S., 148.

Upon these authorities it is submitted that the failure of the Arkansas supreme court to deal with the requested instructions, does not raise such a Federal question as will authorize this court to review that question.

If there was any error in the trial court's refusal to give the instructions requested, counsel in its brief should have pointed out the error and urged it open the state court and its failure to do so, amply justified that court in disregarding the alleged error predicated thereon.

(b) The claim of the Federal right or immunity arising from the refused instructions, is too general and indefinite to give this court jurisdiction.

It will be noticed that the claim of right or immunity claimed by the plaintiff in error in the refused instructions, is alleged to arise "under the interstate commerce act of congress of April 22, 1908, and of the amendments thereto and under the rules and regulations of the interstate commerce commission, and under the act of Congress of April 14, 1910, and under the act of Congress known as the Safety Appli-

ance Act, and under the act of congress, approved April 14, 1910, and the amendments thereto of June 30, 1912 and March 4, 1911, and under the rules and regulations of the interstate commerce commission based upon said acts of congress."

Thus it appears that the Federal right claimed by plaintiff is alleged to have arisen under all these acts of congress and the rules and regulations of the interstate commerce commission as well. According to the specifications, it was impossible for the lower court to ascertain upon what act of congress or what rule or order of the interstate commerce commission plaintiff in error was relying as a basis for its Federal right. The claim of Federal right as made by plaintiff in error, in this assignment is entirely too general and indefinite to authorize a review by this court.

Maxwell vs. Newbald, 18th How., 511.

See Oawell vs. Sandolph, 10th Peters, 368.

N. Y. Central I. I. Co., vs. N. Y., 186 U. S., 269.

Axly Stave Co. vs. Butler Co., 166 U. S., 656.

(c) The claim of immunity set forth in the refused instructions is not granted by the acts of congress referred to or by the rules or orders of the interstate commerce commission.

Section 2 of the act, approved April 14, 1910, provides among other things, that all cars requiring secure ladders and secure running-boards shall be equipped with such running-boards and ladders.

Section 3 of said act, provides that within six

months from the passage of the Act, the Interstate Commerce Commission, after full hearing, shall designate the dimensions, location, and manner of application of appliances provided for by section 2 of this Act and section 4 of the Act of March 2, 1893, and thereafter said number, location, dimension and manner of application as designated by said commission, shall remain as a standard of equipment to be used on all cars subject to the provisions of this Act, unless they are changed by an order of the Interstate Commerce Commission after full hearing, provided the Interstate Commerce Commission may extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act.

Section 4 provides a penalty of one hundred dollars against any common carrier subject to the provisions of the act who shall haul or permit to be hauled any cars not equipped as provided in the Acts by order of the Commission.

Other sections make it the duty of the Interstate Commerce Commission and of the several United States district attorneys to enforce the provisions of the Act by instituting suit to recover the penalty.

In obedience to the provisions of the act, the Interstate Commerce Commission made an order with reference to hand holds, ladders, etc. For house or box cars there should be four ladders located one on either side, not more than eight inches from the right end

of the car, and one on each end not more than eight inches from the left side of car. End ladder treads should be spaced to coincide with treads of side ladder, a variation of two inches being allowed. (R. 249.)

For tank cars, the order of the Commission provides, there shall be two hand holds, one across each head of the tank, not less than 30 nor more than 60 inches above the platform. It was further provided, that these hand holds should not be required if safety railings run around the end of the tank. (R. 261.)

On the 13th day of March, 1911, the Interstate Commerce Commission, under the authority of the Act above referred to, extended the time within which common carriers should comply with section three of said act, in respect to equipment of cars in service, on the 1st day of July, 1911, as follows:

'Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight train cars to comply with the standard prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding the body of the car, it must be equipped according to standards prescribed in said order in respect to hand holds, running boards, ladders, sill steps and brake staffs. (R. 243.)

Presumably it is upon this order of the Interstate commerce commission that the plaintiff in error predicates its claim of immunity from liability on account of the absence of ladders or hand holds on the ends of the cars complained of. If so, its claim, it is

thought, is entirely untenable and therefore without merit.

At the time and before the order extending the time was made by the Interstate Commerce Commission with reference to ladders and hand holds on freight cars, it was the common law duty of carriers to exercise ordinary care to furnish their employees with a reasonably safe place in which to work and with reasonably safe appliances with which to do their work.

This is elementary and it is wholly unnecessary to cite authorities to sustain the proposition. The very fact that in the original order, both side and end ladders were required, shows unmistakably that in the opinion of the Commission all those ladders were necessary in order to furnish the brakemen with a safe place in which to work, while passing from one car to another, in the discharge of his duty. If they were necessary for that purpose then, as between the railroad company and the employees, it certainly was the duty of the former to furnish them, and the order of the commission postponing the operation of the original order for five years from July 1, 1911, unless the cars were shopped for repairs, amounting to practically rebuilding the body of the car, could not, and did not, relieve the railroad company of its common law duty of exercising ordinary care to furnish its employees with a reasonably safe place in which to work. Neither the acts or the orders made in pursuance thereof, pretend to deal

with the civil rights or liabilities of the carriers or its employees as between each other.

The act furnishes its own penalty for a violation of its provisions, or failure to comply with the order of the commission, and especially makes it the duty of the interstate commerce commission, together with the United States district attorneys, to enforce the provisions of the act and the order of the commission as well. There is nothing said in the act or any provision made therein for a recovery by the employee on account of the failure of the carrier to comply with the provisions of the act, or the order of the commission. Hence, it must follow, that if the claim of the railroad company that it was relieved of the duty of equipping its cars with end ladders or end hand holds, if they should be found necessary for the safety of the brakemen, by the acts of Congress above referred to, and the orders of the Interstate Commerce Commission made thereunder, this alleged immunity must result or arise by implication.

In *Texas Railroad Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, this court in discussing, repeals by implication, among other things, said:

"In testing the correctness of this proposition, we concede that we must be guided by the principles that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing

right is so repugnant to the statute, that the survival of such right would in effect deprive the subsequent statute of its efficacy, in other words render its provisions nugatory."

Applying the principles herein announced to the present case, it necessarily follows that the acts of congress referred to and the orders of the interstate commerce commission made thereunder, did not relieve the plaintiff in error of its common law duty of furnishing its servants with a reasonably safe place in which to work and with reasonably safe appliances. There is no repugnancy between such a duty and the provisions of any of the acts referred to and the orders of the Interstate Commerce Commission relied on. Indeed, the duties prescribed by said acts and orders are but cumulative of the pre-existing common law duty of the master to exercise ordinary care to furnish his servant with a reasonably safe place in which to work.

We therefore conclude that plaintiff in error was not absolved from liability arising from its failure to equip its cars with end ladders by the postponement of the operation of the order for five years from July, 1911.

(c) THERE IS ANOTHER AND INDEPENDENT GROUND OF NEGLIGENCE ADEQUATE TO SUSTAIN THE JUDGMENT.

But if it should be conceded that the Acts of Congress referred to and the orders of the interstate commerce commission made in pursuance thereof, did op-

erate to relieve the plaintiff in error of its pre-existing duty to furnish its employees with a reasonably safe place in which to work in regard to ladders and hand holds on the ends of its cars, still that cannot avail plaintiff in error on this motion, because the decision of the state supreme court rests upon two grounds of negligence. 1st. The absence of ladders or hand holds on the ends of the cars complained of, and 2nd. The violent and unnecessary jerking of the train, as it was passing out of Page.

On these two allegations of negligence the lower court held as follows: "We are of the opinion that the jury were warranted in finding that the death of Old resulted from the negligence of the appellant, in causing the violent jerking of the train, which, concurring with its negligence, also in not equipping its cars with necessary ladders, grab irons or hand holds on the ends thereof, in order to enable Old to pass from the S. F. R. D. car to the tank car, caused him to fall between the cars and produced his death." (R. 412.)

On the next page the court further held: "The fact that immediately after this last jerking of the train, some one was heard to cry out, 'Oh, oh,' and that the body of Old was soon thereafter discovered, tends to show a causal connection between the lurching of the train and his death."

In *Allen vs. Arguinhan* 198 U. S., 149, this court held that the Supreme Court of the United States will not take jurisdiction of a writ of error to a state court, where the judgment rests upon two grounds,

one of which does not involve a Federal question.

See also *Rogers vs. Jones*, 214 U. S. 204.

Cal. Powder Works vs. Davis, 151 U. S. 393.

Garr, Scott & Co. vs. Shannon, 223 U. S. 468.

In the latter case, this Court said: "For, as repeatedly ruled, where a state court has decided against the Plaintiff in Error, on a matter of general law, broad enough to sustain the judgment, this Court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention."

Hale vs. Akers, 132 U. S. 554.

Applying these principles to the instant case, it follows that inasmuch as the lower court held that the negligence of the railroad company in causing the violent jerking of the train as it was moving out of Page, concurring also with its negligence in not equipping the ends of its cars with ladders or hand holds, produced Old's death and the negligence of the Company in causing the violent jerking of the train being determined by the general principles of law, it necessarily follows that the negligence of the Plaintiff in Error in causing the violent jerking of the train is broad enough and adequate to sustain the judgment because the Employer's Liability Act provides in Section 2, "that the carriers shall be liable for such injury or death resulting in whole or in part from the negligence of such carrier, etc."

If this latter allegation of negligence, which is abundantly sustained by the testimony, is adequate

to sustain the judgment of the lower court, then, it is wholly unnecessary to consider the question of error in excluding the orders and rules of the Interstate Commerce Commission.

Therefore, we submit plaintiff in error was not denied any right or immunity in the refusal of the court to give these instructions, such as will authorize a review by this court.

IV

INSTRUCTIONS GIVEN.

NO DENIAL OF ANY FEDERAL RIGHT IN THE INSTRUCTIONS GIVEN.

Assignments numbered 12 to 30, inclusive, relate to the instructions given at the request of the defendant in error and on the court's own motion. It is claimed that the plaintiff in error was denied a right and immunity granted to it by a proper construction and application of the Act of Congress, commonly called the Employer's Liability Act in the giving of each of these instructions.

There were no specific objections to any of the instructions given, or at least the Supreme Court of Arkansas declined to consider any specific objections for the reason as stated by the court: "No specific objections to the ruling of the court in the giving and refusing of prayers for instructions are abstracted. Therefore we will not consider any specific objections now urged by counsel to the ruling of the court in passing on the instruction." (R. 415.)

This is in accordance with the established practice of the court.

Files vs. Tebbs, 101 Ark., 207.

Queen of Arkansas Ins. Co. vs. Public School District No. 44, 100 Ark., 328.

This effectually eliminates any but a general objection to any of the instructions given.

Hubbert vs. Chicago, 202 U. S., 275.

Mutual Life Ins. Co. vs. McGraw, 188 U. S., 291.

It is difficult to understand in what manner the plaintiff in error has raised any Federal question on the instructions given on a general objection, for the reason that none of the instructions given attempted to define the meaning of any of the provisions of the Employer's Liability Act, therefore, a construction of that act or any of its provisions is not involved in any of the instructions given. The record nowhere discloses that a construction of the act was sought by either party, either in request for instructions or in objections thereto. The Act upon which the suit was founded, does not define either negligence, contributory negligence, assumed risk or the measure of damages. Therefore, the court in its charge to the jury upon these propositions, was no doubt controlled by the general principles of law on those subjects. Therefore, a general objection to them, it is thought, cannot and does not raise any Federal question granted under the Employer's Liability Act. The instruction on the measure of damages is in accord with the

principals announced in *Mich. Cen. R. R. Co., vs. Vreeland*, 227 U. S., 59, and *American Railway Co. vs. Dedrickson*, 227 U. S., 145.

This court held in *Sea Board Air Line Ry. Co. vs. DuVal*, 225 U. S., 477, which was a suit brought under the Employer's Liability Act, "that in order to give this court jurisdiction to review the judgment of the highest court of a state, in such a case, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act so directly involved that the state court could not have given the judgment it did, without deciding against the contention of the plaintiff in error. That it was the obvious duty of counsel, if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court may be directed to the point and the record here must show that the right now claimed was the right especially set up and denied by the court."

V

PLEADINGS.

RULINGS OF THE COURT IN REGARD TO, INVOLVE NO FEDERAL QUESTION.

Assignment 31 (Motion to strike) 32 (motion to make complaint more certain) 33 (demurrer to complaint) and 43 (motion for a continuance) all relate to questions of pleading.

This court has uniformly held that the sufficiency of pleadings was a matter of state law which the su-

preme court cannot relew on writ of error.

Chicago, Rock Isl. & P. A. A. Co. vs. Schyhart,
227 U. S., 184.

Buena Vista Co. vs. Iowa Falls, etc., R. R. Co.
112, U. S., 165.

National Foundry etc., Works vs. O'Canto
Water Supply Co., 183 U. S., 216.

Long Island etc., vs. Brooklyn, 166 D. S., 685.

Abbott vs. Tacoma Bank, 175 U. S., 409.

VI

TESTIMONY.

RULINGS OF COURT IN ADMITTING AND EX-
CLUDING TESTIMONY DO NOT INVOLVE ANY FED-
ERAL QUESTION.

Assignments 35, 36, 38, 39, 40, 41, 42 and 43 all relate to the rulings of the court in either admitting or excluding testimony. These rulings, it is submitted, do not involve any federal question for the reason that in the absence of a federal statute, they are controlled either by the local or general law of evidence, and therefore cannot involve any right arising under the feredal law or authority. Besides, this contention has time after time been foreclosed by the decisions of this court.

Chicago R. R. Co. vs. Chicago, 166 U. S., 226.

McKay vs. Dallas, 4th How., 44.

Dover vs. Richards, 151 U. S., 658.

Jacobson vs. Mass., 197 U. S., 11.

Northern Pac. R. R. Co., vs. Babcock, 154 U. S., 190.

Wilcox vs. Hunt, 13 Pet. 378.

Knights of Pythias vs. Myer, 193 U. S. 508.

Sec. 5 Wigmore on Ev.

VII.

RULES OF THE INTERSTATE COMMERCE COMMISSION.

NO DENIAL OF ANY FEDERAL RIGHT IN EXCLUDING THEM AS EVIDENCE.

The 37th assignment challenges the ruling of the Court in excluding as evidence the rules and orders of the Interstate Commerce Commission which were offered in evidence by the Plaintiff in Error.

We are at a loss to understand what benefit these rules and orders could have been to the Plaintiff in Error unless the order postponing the operation of the original order as to the number, location of ladders, grab irons, hand holds, etc., did as a matter of law absolve the railroad company from the duty of placing ladders on the ends of its cars, notwithstanding these ladders may be necessary for the protection of the brakemen in passing from the top of a high car to the floor of a low car. In other words, to absolve the railroad company from its common law duty of exercising ordinary care in furnishing its employees with a reasonably safe place in which to work. If that was the effect of the order, postponing the original order, then the testimony offered might be admissible

otherwise, it is not; but this was not the effect of the order.

We have already shown, or rather endeavored to show, in the third sub-division of this brief, that the order and the Acts of Congress upon which it was based, were not intended to restrict the common law duty of the Plaintiff in Error, for the reason they do not deal with the civil rights and duties of the carrier and its employees. The act under which the order was made fixed its own penalty for a violation of the provisions of the order, by declaring the carrier shall in such cases be subject to a penalty of One Hundred Dollars to be recovered by the United States district attorneys under the supervision of the Interstate Commerce Commission. No provision is made in the Acts protecting the rights of the employees in case of a violation of the order.

We therefore submit, that it was not the purpose, nor within the power of the commission to relieve the carrier of its duty of providing its servants with a reasonably safe place in which to work.

Southern Pac. Co. vs. Schuyler, 227 U. S. 601.

If it was not, then the order of the Commission could have been of no advantage to the Plaintiff in Error and for that reason the alleged error, if it be one, is entirely harmless.

It is further submitted that the end ladders were necessary for the protection of the brakemen, which is abundantly shown in the fact that the Commission made the original order requiring these end ladders.

If they were necessary at that time, and will be necessary again after the expiration of five years from July 1, 1911, they were certainly necessary at the time the decedent is alleged to have been killed. The introduction of the orders could only tend to show that in the opinion of the Commission they were necessary for the protection of the brakemen. This being so, the testimony offered really tended to make out a case of negligence against the Plaintiff in Error in not equipping its cars with end ladders, instead of establishing an immunity from the liability for a failure to do so.

VIII.

EXCESSIVE VERDICT AND FORM OF VERDICT. NO DENIAL OF ANY FEDERAL RIGHTS IN REFUS- ING TO DISTURB THE VERDICT ON EITHER OF THESE GROUNDS

In the forty-fifth assignment it is claimed that the Plaintiff in Error was denied a right and an immunity granted to it by a proper construction and application of said Act of Congress of April 23, 1908, and the amendments thereto, by holding the verdict was not excessive and also by holding that said verdict was in due and legal form and in holding that the child of the deceased was entitled to recover for years after his maturity, and by holding that it was unnecessary that the verdict should show the exact amount recovered by the widow and the exact amount recovered by the child."

The record does not show that the State Supreme Court passed on or dealt with any of the questions involved in this assignment, except the alleged excessiveness of the verdict. It does not show by way of an objection to any instruction given or any instruction requested, or any objection to the form of the verdict, or in the motion for a new trial, or in any other manner, that the form of the verdict, the alleged recovery of the infant after his maturity, or the failure of the jury to apportion to each beneficiary the exact amount found for each, has ever in any manner been presented either to the trial court or to the State Supreme Court. Hence the State Supreme Court not only has not decided these questions against the Plaintiff in Error, but as shown by the record it has never had an opportunity to do so, because they have never been presented. We shall endeavor under this assignment to dispose of the questions involved in it separately and in the order stated.

First. As to the claim of the excessiveness of the verdict, it has been held by the Court in a great number of cases, that an objection that the verdict is excessive cannot be reviewed by the Federal Supreme Court on writ of error.

Julian Herencia vs. Gusman, 218 U. S. 44.

The mere excessiveness of the verdict on the evidence does not present a question for re-examination in the Supreme Court on writ of error.

Southern Pacific Ry. Co. (Carolina Division)
vs. Bennett, 233 U. S. 80.

Second. It is further claimed in this assignment that the State Court denied Plaintiff in Error a right and an immunity granted to it under the Employer's Liability Act, in holding that the verdict was in due and legal form. As before stated, this question was never raised in the State Court at all. The State Supreme Court did not deal with the form of the verdict at all, except to hold that it was unnecessary, (except upon the request or objection from the Plaintiff in Error) for the jury to separate the damages arising from the pain and suffering from the damages arising from loss of contributions to the widow and child, and as shown by the record that question is not before this Court, because the Court's ruling in that respect is not assigned as error in this Court. Therefore that question goes out of the case.

The State Court not having passed upon the question of the form of the verdict at all, presumably because it was not presented, it is inconceivable in what respect the highest court of a state could have denied the Plaintiff in Error a right and immunity especially set up and claimed in that respect.

In order to entitle this Court to review any asserted Federal right it must affirmatively appear from the record, that the right claimed was not only called to the attention of the Court, but that it was actually considered by the Court and ruled against the party asserting the right, and if these pre-re-

quisites do not appear of record, the judgment of the State Supreme Court cannot be reviewed by this Court.

Farley vs. Towle, 18 Black 351.

S. P. R. R. Co. vs. Carson, 194 U. S. 136.

Again it has been held by this Court, that the form and effect of a verdict in actions at law, are matters in which the United States Courts are governed by the practice of the Court of a state in which they are heard.

Bond vs. Dustin, 112 U. S. 604.

Glenn vs. Sumner, 132 U. S. 152.

Third. It is also contended in this assignment that Plaintiff in Error was denied a right or immunity under the Employer's Liability Act in that the Court held that the child of the deceased was entitled to recover for years after his maturity. This, like the other questions sought to be reviewed under this assignment has never been presented to the lower Court unless a general objection to the instructions on the measure of damages is sufficient to present that question, and it necessarily follows that Plaintiff in Error has been denied no right or immunity in this respect by the State Supreme Court.

A general objection to an instruction on the measure of damages is not sufficient. A similar objection was urged to an instruction in *McDermott vs. Severe*, 202 U. S. 600, and this Court held (quoting from the syllabus) "that a general exception to a charge covering a number of the elements of damages in a negligence suit does not cover the specific objection that

the language of the Court permitting a recovery for the pecuniary loss directly resulting from the injury, would allow the infant plaintiff to recover compensation for his time before as well as after he had reached his majority, although, during infancy his father is entitled to recover any wages he may earn."

Fourth. The contention under this assignment that the Court held it was unnecessary that the verdict of the jury should show the exact amount recovered by the widow and the exact amount recovered by the child, is also untenable for the reason that the State Supreme Court has made no such ruling. Such a question has never been presented to the State Supreme Court in any form whatever in the present case, therefore, it did not and was not required to pass on any such question.

It should be remembered in passing on this question, that this Court on writ of error to the State Court is limited in its right of review to a consideration of the specific instances of denials of Federal rights.

Waters-Pierce Oil Co. vs. Texas, ^{242 U. S.} 177 U. S., 23 ⁸⁶

This Court has often held that it has no jurisdiction to review the decision of the highest court of a state, unless some right, title, immunity or privilege, the creature of the Federal power has been especially asserted and denied in the State Court.

Murdock vs. Memphis, 20 Wall., 590.

West vs. La., 194 U. S., 258.

Pennsylvania Railroad Co. vs. Hughes, 191
U. S., 477.

Keen vs. Keen, 201 U. S., 319.

The Employer's Liability Act does not require in so many words that the exact amount found for each beneficiary of the deceased employee, shall be stated in the verdict, therefore that Act creates no such right as is claimed by Plaintiff in Error.

If by the process of construction, it should be considered as conferring such a right, then the right conferred has neither been asserted by the Plaintiff in Error or denied by the highest court of the State, and it therefore necessarily follows that no such question is presented to this court for review.

Sea-Board Air Line Railroad Co. vs. DuVal,
225 U. S., 477.

IX

This disposes of all the claims of right or immunity set forth in plaintiff's assignment of errors, after eliminating what we consider repetitions, and in concluding the argument on our motion to dismiss, we wish to submit that it does not necessarily follow that simply because the action is brought under the Employer's Liability Act necessarily Federal questions are involved in the action.

This Court, in *St. L. I. M. & S. Ry. Co. vs. Taylor*, 210 U. S., 281, which was a suit founded on the Safety Appliance Act, held:

"We have not the power to correct mere errors

of State Courts, although affirmed by the highest State Court. This Court is not a general Court of appeals, with the right to review decisions of the State Courts. We may only inquire whether there has been error committed in the decision of those Federal questions which are set forth in Section 709 of the Revised Statutes."

Applying the principles announced, the Court in that case held in effect, that in order to give it jurisdiction to review decisions of the State Court, in actions brought under Federal statutes, it was necessary that some provision of the statute should be construed or some construction of the statute be requested.

This rule was also announced in *Sea-Board Air Line R. R. Co. vs. DuVal*, 225 U. S., 477, which was a suit brought in the State Court under the Employer's Liability Act.

In the present case no construction of the Act under which the suit was brought was sought by either party, and none was involved in any of the rulings of the Court. The case simply turned on the questions of negligence with which this Court is not concerned, unless there is a total absence of testimony tending to establish it. It is an easy matter to claim a Federal right or immunity in most any kind of a case, but the mere claim or assertion of such a right is not sufficient. The true test of jurisdiction as we understand it, is not the mere assertion of a Federal right, but a denial of a Federal right especially set up and claimed. This is a pre-requisite to the jurisdiction

of this Court to review the decisions of the highest Court of a State, and unless these pre-requisites affirmatively appear in the record, and we submit they do not in this case, then this Court will not take jurisdiction.

Another well established doctrine which we submit is controlling here, is that the Federal question asserted must be the turning point in the case and its decision necessary for the judgment sought to be reviewed.

DeSausure vs. Gillard, 127 U. S., 216.

First National Bank vs. Esterville, 215 U. S., 341.

In this last case, Chief Justice Fuller said:

"In order to give this Court jurisdiction of a writ of error to the highest Court of a State in which a decision could be had, it must appear affirmatively that a Federal question was presented for decision; that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment rendered could not have been given without deciding it."

The Federal questions sought to be injected into this case, if there be such, are not necessary to the decision. They are only incidental and cannot be said to be the turning point in the case. So under these authorities and the many others cited herein, it is respectfully submitted that the writ of error should be dismissed for lack of jurisdiction.

ON MOTION TO AFFIRM

The facts have already been fully stated in the presentation of the motion to dismiss. They were conclusions of fact made by the State Supreme Court and are therefore binding upon this Court. Upon these facts the Plaintiff in Error has been convicted of negligently permitting its train to lurch and jerk in such a manner as to throw decedent between the cars, while in the discharge of his duty, and thereby caused his death. Whatever may be thought or said about the uncertainties of the absence of ladders or hand holds on the ends of the cars, having anything to do with his fall, and subsequent death, the fact remains that the violent and unnecessary lurching of the train at the time of the injury did have something to do with it. That this violent lurching was unnecessary and therefore negligent, is shown in the fact that the train moved out up grade from Page, which would necessarily take up the slack in the train the very moment it begun to move, and the testimony of the engineer to the effect that the lurching and jerking of the train could only have been caused by his letting off too much steam, if it occurred at all.

That this violent lurching was the immediate cause of decedent's fall and death is shown in the fact that his cries of distress were heard immediately after the last heavy lurch, and immediately after the train had passed out his body was found on the track 95 yards north of the Station, with his lantern with

a broken globe lying around it eighteen feet south of where he lay.

The State Supreme Court found as a fact, that his death was caused by the negligence of the railroad company, in causing the violent lurching coupled also with its negligence in failing to equip its cars with necessary ladders and hand holds on the ends thereof. This finding of fact is binding on this Court, and inasmuch as the Act under which the suit is brought, provides that the carrier shall be liable for injuries resulting in whole or in part from its negligence, it necessarily follows that the finding of negligence with reference to the violent jerking, concerning which there can be no Federal question, is adequate under the Employer's Liability Act, to sustain the judgment.

Therefore, upon the whole record, it is submitted that the case does not present any Federal question necessary to the decision of the cause, but turns solely on the question of negligence, and its resultant injury; that the Federal questions sought to be raised are not real, and that upon the motion to affirm, even conceding that a Federal question is present in the record, the decision of the State Supreme Court is so clearly right as not to require further argument.

It is therefore submitted that the judgment ought to be affirmed.

XI.

DAMAGES.

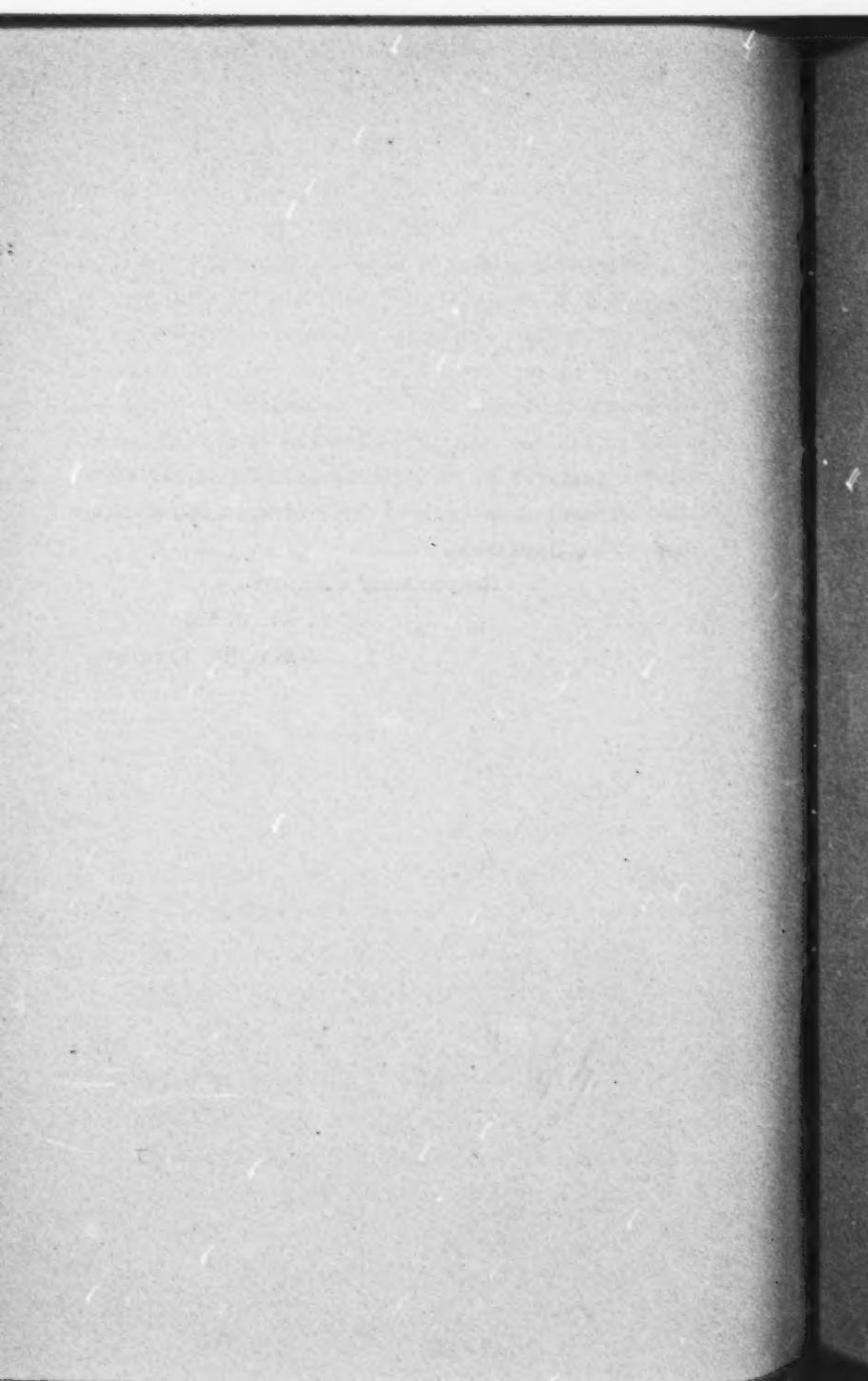
Since it is settled in *Deming vs. Carlisle Packing Co.*, 226 U. S. 102, that this Court has the same power to award damages on the dismissal of a writ of error, for want of jurisdiction, as it has upon affirmance, we respectfully ask that the Defendant in Error be awarded ten per cent of the amount of the judgment for his damages which Rule 23 permits, either upon the dismissal of the writ of error or upon the affirmance of the judgment.

Respectfully submitted,

W. P. FEAZEL,

Nashville, Arkansas.

Counsel for Defendant in Error



FILED

FEB 15 1915

JAMES D. MAHER

CLERK

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1914.

THE KANSAS CITY SOUTHERN RAILWAY COM-
PANY, *Plaintiff in Error,*

vs.

SAM E. LESLIE, Administrator of the Estate of
LESLIE A. OLD, Deceased,

Defendant in Error.

No. 533.

In Error to the Supreme Court of the State of Arkansas.

Brief of Plaintiff in Error in Opposition to
Motion of Defendant in Error to
Dismiss or Affirm.

SAMUEL W. MOORE,

FRANK H. MOORE,

JAMES B. McDONOUGH,

Attorneys for the Plaintiff in Error.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1914.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

SAM E. LESLIE, Administrator of the Estate of
LESLIE A. OLD, Deceased,
Defendant in Error.

No. 538.

In Error to the Supreme Court of the State of Arkansas.

Brief of Plaintiff in Error in Opposition to Motion of Defendant in Error to Dismiss or Affirm.

STATEMENT.

Sam E. Leslie, the defendant in error, will be referred to as the plaintiff, and The Kansas City Southern Railway Company, as the defendant, as they were respectively the plaintiff and defendant in the trial court.

As the record in this case has already been printed, there appears to be no need for any extended statement in this brief, in addition to what is covered under the various points in the argument. The plaintiff, in his brief discusses at some length the evi-

dence in the case. We do not understand that this is desired in a brief on this motion, and we therefore have not gone into the subject. We do not, however, accept as correct the statement of facts made by the plaintiff, nor that quoted from the opinion of the Supreme Court of Arkansas.

Plaintiff's decedent, Leslie A. Old, was employed as brakeman by the defendant. On March 24, 1913, Old was acting as swing or middle brakeman on a freight train which was being operated in a northerly direction over defendant's road from DeQueen, Ark., to Heavener, Okla. As this train was pulling out of Page, Okla., Old was, in some manner, run over and fatally injured. There were no eye-witnesses to the accident. The case was brought and tried under the Federal Employers' Liability Act, as amended April 5, 1910.

Plaintiff, in his amended complaint (Rec. 22-27), alleged that Old's work as middle brakeman required him to pass over the tops of the cars composing the middle section of the train, and that while he was passing from a refrigerator car to a tank car, he fell and was run over. This was alleged to be due to the fact that the run-way of the tank car was seven or eight feet lower than the run-way of the refrigerator car, and that the refrigerator car and tank car were not provided with proper handholds and end ladders so as to afford a safe passage from the one car to the other; that these cars should not have been placed together; and that the alleged lack of proper appliances for passage between these cars, concurring with defendant's alleged negligence in causing the cars to jerk and jolt violently through defective air brakes or improper manipulation of the air, caused the injury.

The defendant filed a petition and bond for removal of the case to the Federal Court on the ground of diversity of citizenship. The state court denied this petition.

The accident happened after the Federal Employers' Liability Act had been amended by the addition of section 9, which provides for the survival of the cause of action of an injured employee, in

certain cases. Plaintiff sued for and was permitted to recover not only the pecuniary loss of the beneficiaries,—Old's widow and child,—under section 1 of the Act, but plaintiff was also permitted to recover additional damages under section 9, on account of Old's pain and suffering from the time of his injury until his death, which occurred about an hour and a half after the injury.

According to the Supreme Court of Arkansas, the plaintiff recovered \$14,518.00 for compensation, and \$3,482.00 on account of the pain and suffering of the decedent.

We believe that the above statement, with what is set forth in connection with the discussion of the various points, will be sufficient for a consideration of the motion to dismiss or affirm.

ARGUMENT.

I.

There is no foundation for the motion to dismiss or affirm.

The motion to dismiss goes to the jurisdiction of the court. The motion to affirm assumes the jurisdiction of the court, but will not be entertained unless the federal question upon which the jurisdiction was taken is not debatable.

This is very clearly stated by Mr. Chief Justice White in *Louisville, etc., Ry. Co. v. Melton*, 218 U. S., 36, 1. c., page 49:

We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decision upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the sub-

ject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject.

We submit that, tested by the above principles, the motion to dismiss or affirm should be denied.

II.

The denial by the highest court of the state of the contention of the defendant that a verdict should have been directed in its favor, because there was no substantial or sufficient evidence to support a verdict for the plaintiff, raises a Federal question reviewable by this court.

As plaintiff appears to contend that this point was not properly saved by defendant, defendant calls attention to its request for a peremptory instruction, and to No. 1 of the requested instructions presented by defendant at the close of the evidence (Rec., 345); assignments 129 and 130 of its motion for new trial (Rec., 390); second assignment of error (Rec., 418); discussion of the point in the opinion of the Supreme Court of Arkansas (Rec., 411); paragraphs 16 and 17 of its petition for rehearing (Rec., 399), and to the saving of necessary exceptions.

The Supreme Court of Arkansas did not consider this a frivolous question, for it said in its opinion (Rec., 411):

Appellant next urges that the court erred in refusing to direct a verdict for the defendant. This we consider the most difficult question in the case and it has given us the greatest concern, but we are of the opinion that the case cannot be distinguished in principle, on the facts, from the recent cases of *St. L., I. M. & S. Ry. Co. v. Owen*, 103 Ark., 61, and *St. L., I. M. & S. Ry. Co. v. Hemphling*, (107 Ark., 476), *supra*.

Plaintiff adopts as a part of his statement of the case, in his brief on the motion to dismiss or affirm, the following from the opinion of the Supreme Court of Arkansas (pp. 4-5 of plaintiff's brief):

This is a suit brought by the appellee, as the administrator of the estate of Leslie A. Old, deceased, for the benefit of the widow and her infant child, under the Federal Employers' Liability Act and its amendment of April 5, 1910.

It is undisputed, therefore, that the case arises under the Federal Employers' Liability Act. Consequently the denial of defendant's request that the court direct a verdict in its favor, raised a Federal question, which defendant is entitled to have reviewed by this court.

Plaintiff contends that the findings of fact of the Supreme Court of Arkansas are conclusive on this court, and, therefore, that this court cannot examine the evidence to see whether or not it was error to refuse to direct a verdict. In making this contention, plaintiff overlooks the fact that a different rule applies where plaintiff's cause of action is exclusively based on a Federal statute.

As stated in the second syllabus in the case of *St. Louis, Iron Mountain & Southern Railway Company v. McWhirter*, 220 U. S., 265, the rule is as follows:

While the power of this court to review the judgment of a state court is controlled by Sec. 709, Rev. Stat., Sec. 237, Judicial Code, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal statute, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.

In the case of *Kansas City Southern Railway Company v. C. H. Albers Commission Co.*, 223 U. S., 591, the court says:

* * * While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.

Cedar Rapids Gas Light Company v. Cedar Rapids, 223 U. S., 655;

Creswill v. Grand Lodge, K. P., 225 U. S., 246;

Southern Pacific Company v. Schuyler, 227 U. S., 601;

North Carolina R. R. Co. v. Zachary, 232 U. S., 248.

The distinction between the two lines of cases is well illustrated by the case of *Missouri, Kansas & Texas R. Co. v. West*, 232 U. S., 682. In the *West* case, plaintiff brought suit against

the railway company for damages on account of the death of William B. West, who was fatally injured while performing the duties of express messenger and baggageman. If West was the employe of the express company, the Federal act did not apply; if he was the employe of the railway company, the Federal act did apply. The state court found from the evidence that West was the employe of the express company and that, consequently, the state law, and not the Federal act, applied. The plaintiff in that case therefore contended before this court that the case was decided on a non-federal ground, and no Federal question was involved.

In upholding the latter contention and distinguishing the McWhirter case, this court, *l. c.*, p. 690, said:

In the McWhirter case the action was in express terms based on a statute of the United States—the hours of service act of 1907. It was contended that the pleadings embraced as well an action at common law, and that such cause of action was sustained and was broad enough to support the judgment, irrespective of what may have been decided concerning the statute of the United States, and a motion to dismiss was made. The contention was rejected and the motion was denied. It was recognized that the case coming from a state court, the power to review was controlled by Revised Statutes, Sec. 709 (U. S. Comp. Stat. 1901, p. 575), but it was said, however, that "Where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

Plaintiff contends on pages 42-45 of his brief that there is an independent ground of negligence found by the Supreme Court of Arkansas, which is adequate to sustain the judgment, and does not involve a Federal question; that is, that the Supreme Court of Arkansas held that defendant was guilty of negligence: (1) on account of the alleged insufficient number of ladders and handholds on the ends of the cars, and (2) on account of the alleged violent and unnecessary jerking of the train. Plaintiff's contention, as we understand it, is that, conceding that the question regarding ladders and handholds may involve a Federal question, there is the independent ground of negligence, *i. e.*, the jerking of the cars, which is sufficient to support the judgment, and in-

volves no Federal question. Plaintiff invokes the cases holding that this court will not review a case on writ of error from a state court, where the judgment rests upon two grounds, one of which does not involve a Federal question. We do not think the two alleged acts of negligence may be separated, since the case has been tried on the theory that they concurred in causing the injury; but if they could be separated, and were the only questions involved in the motion to direct a verdict, the question would still remain whether the evidence is legally sufficient to make a case under the Federal Employers' Liability Act.

In *St. Louis, Iron Mountain & Southern R. Co. v. McWhirter*, 229 U. S., 276, the court said:

The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone, affords no basis for saying that the case was decided on such ground. * * * This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony upon the assumption that there was nothing adequate to go to the jury to show liability under the Federal law. While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat., Sec. 709, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.

In the case at bar, as above stated, plaintiff's cause of action was based entirely upon the Federal Employers' Liability Act. Consequently, the findings of the state court are not conclusive, and the question of the sufficiency of the evidence is reviewable by this court.

This is true even where the question of the sufficiency of the evidence is the only Federal question raised.

Yazoo & M. V. R. Co. v. Wright, 35 Sup. Ct. Rep., 130.

But, as shown below, there are, in the case at bar, other substantial and important Federal questions, involving the construction of the Constitution and laws of the United States, which were

decided by the State Court adversely to the contention of the defendant, and which are, therefore, sufficient to support this writ of error.

III.

The instruction given by the trial court regarding the measure of damages under the Federal Employers' Liability Act, as amended April 5, 1910, was erroneous and our contention in this respect, which was denied by the state court, raises a Federal question reviewable by this court.

The instruction referred to is No. 10 of the instructions given by the court upon motion of the plaintiff and is as follows (Rec., 374):

If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff.

The defendant duly saved a separate exception to the giving of the above instruction (Rec., 374) and stated its objections (Rec., 344), although the court refused to hear them (Rec., 342).

The Supreme Court of Arkansas, in its opinion in this case, in discussing the measure of damages under the Federal Employers' Liability Act as amended April 5, 1910, says in part (Rec., 414):

Under the Employers' Liability Act and its amendment of April 5th, 1910, appellee as administrator of the estate of Leslie Old was entitled to recoverable damages by way of

compensation for the financial loss to the widow and child of deceased by reason of the death of the husband and father. Appellee could also recover for the conscious pain and suffering which the husband and father endured after the injury, which survived to appellee as the personal representative of Old for the benefit of his widow and child. See Act of Congress April 22, 1908, Sec. 1, and section 9 added by amendment April 5th, 1910.

The plaintiff claims that the question was not properly raised in the lower court. We understand that it is sufficient to show that the Supreme Court of Arkansas passed on the question. As this court said in *Miedreich v. Lawstein*, 232 U. S., 236:

Although the record is meager of attempts to raise it, if the state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this court regards the question as duly made.

See also *North Carolina R. R. Co. v. Zachary*, 232 U. S., 248.

The defendant, however, offered, and the lower court, against the defendant's exception, refused to give, among others, the following instructions:

Under the law and the allegations of the complaint and the evidence, the plaintiff is not entitled to recover in this action any damages whatever for physical or mental pain or suffering. Under the Employers' Liability Act of Congress of April 22, 1908, and the amendments thereto, and under the Constitution of the United States, the plaintiff is not entitled to recover any sum whatever for physical or mental pain and suffering (Rec., 345).

If the jury should find the issue for the plaintiff, it will then be the duty of the jury to determine the amount of damages, if any, to which plaintiff will be entitled to recover. Under the Act of Congress of April 22, 1908, and the amendments thereto of April 5, 1910, the plaintiff is not entitled to recover for any pain and suffering, either mental or physical (Rec., 370-371).

The court also refused to give the following instruction offered by the defendant and duly excepted to by it:

If Leslie Old, the deceased, was not guilty of negligence, and if the defendant was guilty of negligence as herein defined, and if the plaintiff under the instructions heretofore given is entitled to recover, the jury may consider any right

of action, if any, which the deceased would have had, if he had lived. However, under the Act of Congress of April 22, 1908, and the Act of Congress of April 5th, 1910, under which the plaintiff brings this action, the plaintiff is not entitled to recover damages for the loss of the support and maintenance which the widow and child of Leslie Old would have received if he had lived, and in addition thereto to recover an additional sum as damages that might have been due to Leslie Old, had he lived. Under said Acts of Congress, only one recovery can be had, and that recovery, if plaintiff is entitled to such recovery, must be limited solely and exclusively to the loss which the widow and child of the deceased will suffer by reason of the death of said Leslie Old. Under said Act of Congress, the plaintiff is not entitled to recover damages for the loss of the husband and father of said widow and child, and then in addition thereto, the damages which said Leslie Old could have recovered, if any, if he had lived. If the defendant was guilty of negligence as herein outlined, the plaintiff is entitled to one recovery only, and the amount of that recovery must be limited to the loss which the widow and child of said Leslie Old have sustained by reason of his death, and in arriving at that amount, the jury may consider whether said Leslie Old would have recovered any sum had he lived, but cannot under said Acts of Congress ascertain that sum and then add it bodily to an additional sum growing out of the loss to the widow and child of the husband and father.

Exceptions were duly saved (Rec., 372).

It is well settled in Arkansas that a request for a proper instruction is a sufficient objection to an improper instruction given by the court. *Chicago Mill and Lumber Company v. Johnson*, 104 Ark., 67.

Defendant contended in the state court and contends here (1) that, under the Federal Employers' Liability Act as amended April 5, 1910, where suit is brought under section 1, on account of alleged wrongful death of an employee, there is no right of action under section 9 of the act, section 9 being intended only to cover cases where an employee is injured, but dies from some cause other than the injury; (2) that if the above contention is not correct, the plaintiff, in any event, is only entitled to recover the amount of the pecuniary loss of the beneficiaries, whether the suit is brought under section 1, or section 9, or under both section 1 and

section 9; (3) that the instruction was erroneous also in not limiting the recovery on behalf of the child to the child's minority; in not requiring the jury to take into consideration the care and attention which one of decedent's disposition and character might be expected to give to his family; in not requiring the jury to separate the amount awarded under section 1 from the amount awarded under section 9; in failing to require the jury to separate the amount awarded to the widow from the amount awarded to the child; and in other particulars.

This is clearly a claim of a right, privilege, or immunity under a Federal statute which was denied to defendant by the state court, and which it is entitled to have reviewed. Plaintiff recovered \$14,518.00 for compensation, and \$3,482.00 for pain and suffering, according to the Supreme Court of Arkansas (Rec., 417).

In *St. Louis, Iron Mountain & Southern Railway Company v. Taylor*, 210 U. S., 281, the court said:

The denial by the state court to give to a Federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the United States and presents a Federal question reviewable by this court under section 709, Rev. Stat.

The court said in *Seaboard Air Line Ry. v. Horton*, 283 U. S., 499:

There is a further motion to dismiss for want of jurisdiction upon the ground that no right, privilege, or immunity under the Employers' Liability Act was especially set up or claimed in the state court of last resort and by that court denied, but since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act which, if acceded to, would presumably have produced a verdict in its favor and consequently immunity from the action, this motion must be denied upon the theory of *St. L., I. M. & S. Ry. Co. v. McWhirter*, 229 U. S., 265, 57 L. Ed. 1179, 33.

That defendant's objection to the instruction above quoted, given at the instance of the plaintiff, is not frivolous is, we submit, shown by the following considerations:

(a) It has been held by the following courts in states having both a death statute and a survival statute, that there can be no recovery under a survival statute except in cases where death results from some cause other than the injury. *Holton v. Daly*, 106 Ill., 131; *C. & E. I. R. Co. v. O'Connor*, 119 Ill., 586; *McCarthy v. C. R. I. & P. R. Co.*, 18 Kansas, 46; *Lubrano v. Atlantic Mills*, 10 Rhode Island, 129.

(b) The addition of section 9, providing for the survival of the employee's cause of action under section 1, was brought about by the decisions in the cases of *Fulgham v. M. V. R. R. Co.*, 167 Fed., 660, and *Walsh v. N. Y., N. H. & H. R. Co.*, 173 Fed., 494. In those cases it developed that there was a defect or gap in the original act of 1908. That gap or defect was this: If the injured employee lived after his injury and died from other causes, then there could be no recovery by the relatives under the Federal Employers' Liability Act as it then existed. Under that act, previous to its amendment, if the employee died from his injuries, a right of action immediately sprung up in favor of his relatives, as provided in the act. If, however, he died from other causes, there could be no recovery.

An amendment to the original act was therefore passed to remove this defect or gap. The legislative history of the latter act, as described in the reports of the committee, shows that that was the sole purpose of the amendment. See Volume 45, part 3, Congressional Record, 61st Congress, Second Session, pages 2253-2254. Mr. Sterling, a member of and speaking for the House Committee (Congressional Record, Vol. 45, p. 2253), said:

The third amendment relates to the survival of the action. One of the courts in Connecticut held that under this law where the injured party died before action was commenced, or after action was commenced, from some other cause than the injury, the action did not survive to the personal representative of the deceased. This provides that the action shall survive to the personal representative for the benefit of the widow or next of kin in the order named in the original law.

In further explanation of this amendment Mr. Sterling (p. 2258 of said Congressional Record) also said:

It simply provides that where the action survives, then the

damages are limited to compensatory damages; for instance, if the injured man brings a suit and dies before judgment from other causes than the injury, then, under this provision of the bill, the action survives to recover compensatory damages only.

It is therefore clear that the passage of this act of April 5, 1910, was for the sole purpose of providing compensatory damages in the event that the injured party died from other causes after the injury and before recovery. It is well settled in this court that reference may be had to the legislative history of such acts of Congress, for the purpose of aiding in the ascertainment of the intention of Congress in passing the legislation. See *Johnson v. Sou. Pac. Co.*, 196 U. S., 1.

(c) So far, this court has held that beneficiaries under the Federal Employers' Liability Act are entitled to recover only the pecuniary loss sustained by them through the wrongful death of an employee.

Norfolk & Western R. Co. v. Holbrook, 35 Sup. Ct. Rep., 143;

Michigan C. R. Co. v. Vreeland, 227 U. S., 59;

Gulf C. & S. F. R. Co. v. McGinnis, 228 U. S., 173;

North Carolina R. Co. v. Zachary, 232 U. S., 248;

American R. Co. v. Didricksen, 227 U. S., 145;

Garrett v. L. & N. R. Co., 35 Sup. Ct. Rep., 32.

IV.

The court erred in refusing to admit in evidence the order of the Interstate Commerce Commission with regard to handholds, ladders, and other safety appliances, promulgated in accordance with the third section of the Safety Appliance Act of April 14, 1910. This involves a denial by the state court of our construction of the said order and the act under which it was promulgated, and constitutes a Federal question reviewable by this court.

The Supreme Court of Arkansas, in its opinion in the case at bar, (Rec., 410) says:

There was no error prejudicial to appellant in refusing to permit it to show that under the rules of the Interstate Commerce Commission appellant was not required to put

handholds on the ends of the cars complained of until July 1st, 1916, unless the cars were shopped for general repairs. This ruling of the court was not prejudicial to appellant because the effect of the testimony was only to show that in the opinion of the Interstate Commerce Commission it was necessary for cars like the one under consideration to be equipped with handholds or end ladders in order to insure as far as possible the safety of employes who were required to use them. The fact that the Interstate Commerce Commission postponed the time for equipping the cars that were then in service did not relieve the appellant of the duty of exercising ordinary care to furnish its employes with safe appliances, and to provide them a safe place in which to do their work. The Interstate Commerce Commission was without power to exempt the carrier from liability caused by its negligence.

The evidence showed that the two cars which plaintiff claimed were not properly equipped with handholds and end ladders, were foreign cars not belonging to the defendant, which were received in the regular interchange of cars with other railroad companies in the conduct of interstate commerce. These cars complied with the rules of the Master Car Builders' Association and the Safety Appliance Regulations prescribed by the Interstate Commerce Commission (Rec., 187, 233, 237). Defendant contends that Congress, by passing the Safety Appliance Acts, and delegating to the Interstate Commerce Commission the duty of making rules and regulations governing safety appliances, has taken entire charge of this subject, and that defendant is not guilty of negligence in operating its own cars so long as they comply with such regulations; and with even greater reason, that it is not guilty of negligence in receiving foreign cars in interstate commerce, if they comply with the said regulations.

As the Supreme Court of Arkansas held adversely to this claim of defendant, a Federal question is presented.

One who sets up a Federal statute as giving immunity from a judgment against him, which claim is denied by a decision of a state court, may bring the case here for review under section 709 of the Revised Statutes, now section 237 of the Judicial Code.

Straus v. American Publisher's Assn., 231 U. S., 222, and cases above cited.

V.

The defendant in due time filed its petition and bond for removal of this cause to the proper Federal court on the ground of diversity of citizenship, contending that removal on this ground, of a case arising under the Federal Employers' Liability Act, is not prohibited by the provisions of the Employers' Liability Act, nor of the Judicial Code; and, if so prohibited, that such prohibition is in conflict with the 5th Amendment of the Constitution of the United States, and is void. This involves a construction of the Constitution and laws of the United States, and the denial by the state court of the defendant's contention in this regard raised a Federal question reviewable by this court.

The question was passed on by the Supreme Court of Arkansas, saying (Rec., 407):

The court did not err in denying the petition for removal to the Federal court.

Defendant's contention that a proper construction of the acts in question does not prevent a removal of such a case, when requisite diversity of citizenship exists, is substantial and is well stated in *Van Brimmer v. Texas & Pacific Railway Company*, 190 Fed., 398, where the court said:

I am unable to bring myself to the conclusion that the amendment deprives a litigant of the right to remove his case to the federal court who had that right independent of the employer's liability act. I hold that the amendment in question does no more than to provide that, where a cause of action arises under the employer's liability act, the suit should not, for that reason, be removed, but that it does not affect the right of removal in cases where the right exists by virtue of some other law. Cases of federal jurisdiction are divided into two classes: (1) Where the jurisdiction is dependent on the character of the parties, as, for instance, citizens of different states, corporations with federal charters, citizens who, on account of prejudice or local influence, cannot obtain justice in the state courts, etc. (2) Where the jurisdiction is dependent on the subject-matter or character of the suit, as where the federal constitution or laws are involved. Cases under the employer's liability act fell within the second class, and that constituted the reason why they might be removed to the federal court until the passage of the amendment of April 5, 1910. But can it be supposed that, in a case where

a defendant could not obtain justice in the state courts on account of prejudice or local influence, Congress intended to deprive such defendant of the right to take the case to the United States court simply because the cause of action arose under the employers' liability act? The purpose of the provisions of the law allowing removals in cases of prejudice and local influence was to insure justice and fair trials in court to all citizens of the United States, and these objects would be defeated in every case of prejudice or local influence, where the cause of action arose under the act of April 22, 1908, as amended, if the amendment in question is given the effect contended for by the plaintiff.

The law provides that the courts of the United States shall have jurisdiction over controversies between citizens of different states, and that in this class of cases the right of removal exists where the suit has been instituted in the state court. The purposes intended to be accomplished by this legislation are too patent to need mention, and yet, if the amendment of April 5, 1910, be given the construction urged in argument by the plaintiff, even in this class of cases, the right of removal would be taken away where the cause of action arose under the employers' liability act. It is not conceivable that Congress intended to confer any such exceptional privilege upon the one class of citizens mentioned in that act, to the exclusion of all other citizens.

If, however, those acts do prohibit such removal, we contended in the state court and contend here, that such a provision conflicts with the 5th Amendment to the Constitution of the United States, and is therefore invalid. If it be true, as contended by plaintiff, that Congress may restrict the right of removal, and not grant it to the full extent allowable under the provisions of the Constitution, it is none the less true that, in legislating on the subject, Congress must observe the requirements of the Fifth Amendment to the Constitution. In restricting the right of removal, Congress has heretofore observed the rules of proper classification and equality of treatment in its legislation on this subject; for instance, in restricting the right of removal to cases involving not less than a certain amount of money, all litigants are treated alike. In the present case, however, only defendants under the Federal Employers' Liability Act are thus discriminated against.

So far as we know, no good reason has been given for this discrimination, which appears to be entirely arbitrary. It cannot

be because the suits are personal injury suits. The plaintiff, in cases arising under the Federal Employers' Liability Act, is allowed to sue in the Federal court, if he so elects. Suits for personal injury arising under state law, are removable where the requisite diversity of citizenship exists. If removal in such cases is prohibited, the curious result is reached that a defendant may remove a personal injury case to the Federal court if it arises under the state law, but may not remove it, if it arises under the Federal law. It is defendant's contention that the prohibition of removal of cases arising under this act conflicts with the Fifth Amendment to the Constitution of the United States, and is therefore void.

We submit that the motion to dismiss or affirm should be overruled.

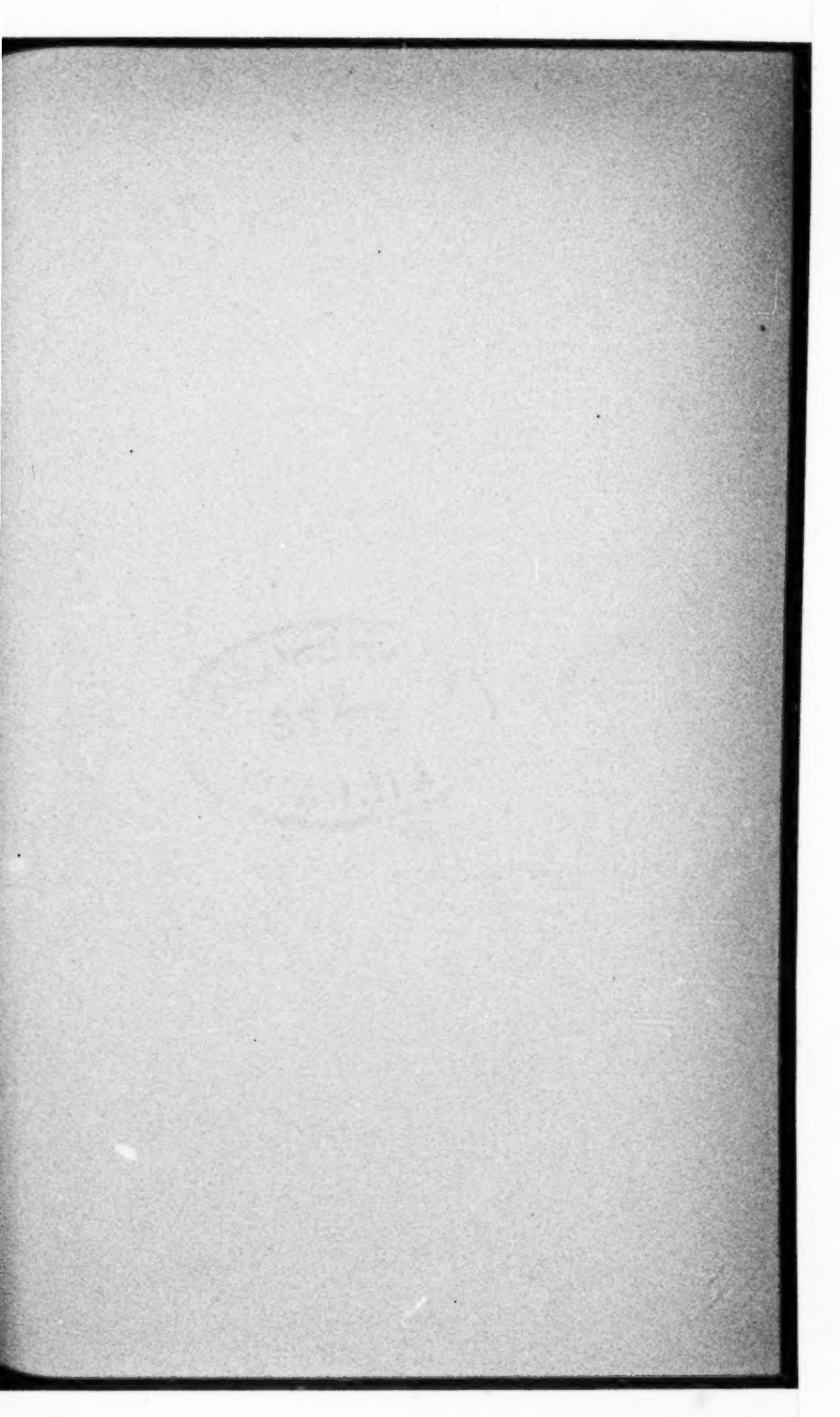
Respectfully submitted,

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Attorneys for the Plaintiff in Error. S



KANSAS CITY SOUTHERN RAILWAY COMPANY
v. LESLIE, ADMINISTRATOR OF OLD.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 538. Argued April 22, 1915.—Decided June 21, 1915.

Under the Employers' Liability Act as amended in 1910 and § 28, Judicial Code, a cause brought in a state court of competent jurisdiction under the Employers' Liability Act cannot be removed to a Federal court upon the sole ground of diversity of citizenship.

Under the Employers' Liability Act as amended in 1910 there can be a recovery for pecuniary loss to the widow and children of decedent and also for conscious pain and suffering endured by decedent in the period, even though brief,—in this case about two hours—between injury and death. *St. Louis, Iron Mtn. & Southern Ry. v. Craft*, 237 U. S. 648.

Even though the declaration may set up distinct and independent liabilities springing from one wrong—as for the suffering endured before death and the death itself—in an action under the Employers' Liability Act, in the state court the jury need not, if it is in accord

with local practice, specify the different amounts awarded for the suffering before death and the death itself.

Under the Employers' Liability Act the recovery of pecuniary damages by the personal representative of the deceased is in trust for the beneficiaries designated by the act and must be based upon their actual pecuniary loss.

112 Arkansas, 305, reversed.

THE facts, which involve the validity of a verdict and judgment for damages for personal injuries obtained in an action under the Federal Employers' Liability Act, are stated in the opinion.

Mr. James B. McDonough, with whom *Mr. Samuel W. Moore* and *Frank H. Moore* were on the brief, for plaintiff in error.

Mr. W. P. Feazel for defendant in error:

No Federal question arises in the denial of the petition for removal.

There was no denial of any Federal question or immunity in the refusal to direct a verdict for plaintiff in error.

There was no denial of any Federal right in refusing instructions.

The claim of the Federal right or immunity arising from the refused instructions is too general and indefinite to give this court jurisdiction.

The claim of immunity set forth in the requested instructions is not granted by the Acts of Congress referred to or by the rules or orders of the Interstate Commerce Commission.

There is another and independent ground of negligence adequate to sustain the judgment.

There was no denial of any Federal right in any instructions given nor do the rulings of the court in regard thereto or to admitting and excluding testimony involve

any Federal question. There was no denial of any Federal right in excluding rules of the Interstate Commerce Commission as evidence.

There was no denial of any Federal rights in refusing to disturb the verdict on either of these grounds.

An excessive verdict does not involve a Federal question.

No question as to the form of the verdict was raised or decided in the lower court.

General objections to instruction on measure of damages are not sufficient to raise the question that the infant child was permitted to recover damages after maturity.

As to the failure of the jury to apportion damages, that question is not raised or decided by the lower court.

Numerous authorities of this and other courts support these contentions.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

In May, 1913, Sam E. Leslie, administrator, brought this suit under the Federal Employers' Liability Act (35 Stat. 65), as amended April 5, 1910 (36 Stat. 291), against the Kansas City Southern Railway Company in the Circuit Court, Little River County, Arkansas, alleging that the injury and death of Leslie Old (March 24, 1913) resulted from its negligence, and demanding \$10,000 for pain and suffering endured by deceased and \$15,000 pecuniary damage to the wife and young child. The Company unsuccessfully sought to remove the case; there was trial to a jury and verdict for \$25,000 without apportionment, a *remittitur* of \$7,000, and a final unqualified judgment in favor of the administrator for \$18,000, which the Supreme Court of Arkansas affirmed (112 Arkansas, 305). Three substantial assignments of error demand consideration.

1. The deceased and his administrator were citizens and residents of Arkansas. The Railway Company, a Missouri corporation, seasonably set up non-residence and demanded removal of the cause to the United States District Court. Its petition therefor was denied and this is now assigned as error.

The above-mentioned amendment of 1910 declares: "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." Section 28, Judicial Code, effective January 1, 1912, specifies causes removable from state courts by non-resident defendants and concludes: "Provided, That no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employes in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States." The language of both amendment and Judicial Code, we think, clearly inhibits removal of a cause arising under the Act from a state court upon the sole ground of diversity of citizenship. The same conclusion has been announced frequently by lower Federal courts. *Symonds v. St. Louis &c. Ry.*, 192 Fed. Rep. 353, 356; *Strauser v. Chicago &c. R. R.*, 193 Fed. Rep. 293, 294; *Saiek v. Penna. R. R.*, 193 Fed. Rep. 303; *Lee v. Toledo &c. Ry.*, 193 Fed. Rep. 685, 686; *Ullrich v. N. Y., N. H. & H. Ry.*, 193 Fed. Rep. 768, 770; *Hulac v. Chicago &c. Ry.*, 194 Fed. Rep. 747, 749; *McChesney v. Illinois Central R. R.*, 197 Fed. Rep. 85, 87; *De Atley v. Chesapeake & Ohio Ry.*, 201 Fed. Rep. 591, 596; *Kelly's Adm'x v. Chesapeake & Ohio Ry.*, 201 Fed. Rep. 602, 605; *Rice v. Boston & Maine R. R. Co.*, 203 Fed. Rep. 580, 581; *Teel v. Chesapeake &*

O. Ry. of Virginia, 204 Fed. Rep. 918, 921; *Patton v. Cincinnati &c. Ry.*, 208 Fed. Rep. 29, 30; *Eng v. Southern Pacific Co.*, 210 Fed. Rep. 92, 93; *Burnett v. Spokane &c. Ry.*, 210 Fed. Rep. 94, 95. A different view expressed in *Van Brimmer v. Tex. & Pac. Ry.*, 190 Fed. Rep. 394, decided October, 1911, cannot be accepted.

2. It is said the court below erred in approving the charge permitting recovery for pecuniary loss to widow and child and also for conscious pain and suffering endured by deceased in the brief period—less than two hours—between injury and his death. This point having been considered the right to recover for both these reasons in one suit was recently sustained. *St. Louis, Iron Mtn. &c. Ry. v. Craft*, 237 U. S. 648 [announced June 1, 1915].

It is further objected that as the declaration set up two distinct and independent liabilities springing from one wrong but based upon different principles, the jury should have been directed to specify in their verdict the amount awarded, if any, in respect of each. This objection must be overruled. Of course, in causes arising under this statute trial courts should point out applicable principles with painstaking care and diligently exercise their full powers to prevent unjust results; but its language does not expressly require the jury to report what was assessed by them on account of each distinct liability, and in view of the prevailing contrary practice in similar proceedings we cannot say that a provision to that effect is necessarily implied. As the challenged verdict seems in harmony with local practice and has been approved by the courts below the judgment thereon is not open to attack here upon the ground specified.

3. Complaint is also made of the following instruction—No. 10—given at the administrator's instance: "If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the con-

scious pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff." The Arkansas Supreme Court expressly approved this upon authority of *Railway Co. v. Sweet*, 60 Arkansas, 550. Recent opinions of this court have laid down the rule concerning the measure of pecuniary damages to beneficiaries which may be recovered under the Act. A recovery therefor by the administrator is in trust for designated individuals and must be based upon their actual pecuniary loss. *Michigan Cent. R. R. v. Vreeland*, 227 U. S. 59, 68; *American Railroad v. Didricksen*, 227 U. S. 145, 149; *Gulf, Colorado &c. Ry. v. McGinnis*, 228 U. S. 173, 175; *North Carolina R. R. v. Zachary*, 232 U. S. 248, 256, 257; *Norfolk & Western Ry. v. Holbrook*, 235 U. S. 625, 629. Instruction No. 10 conflicts with the approved rule and the probable result was materially to prejudice plaintiff in error's rights.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.